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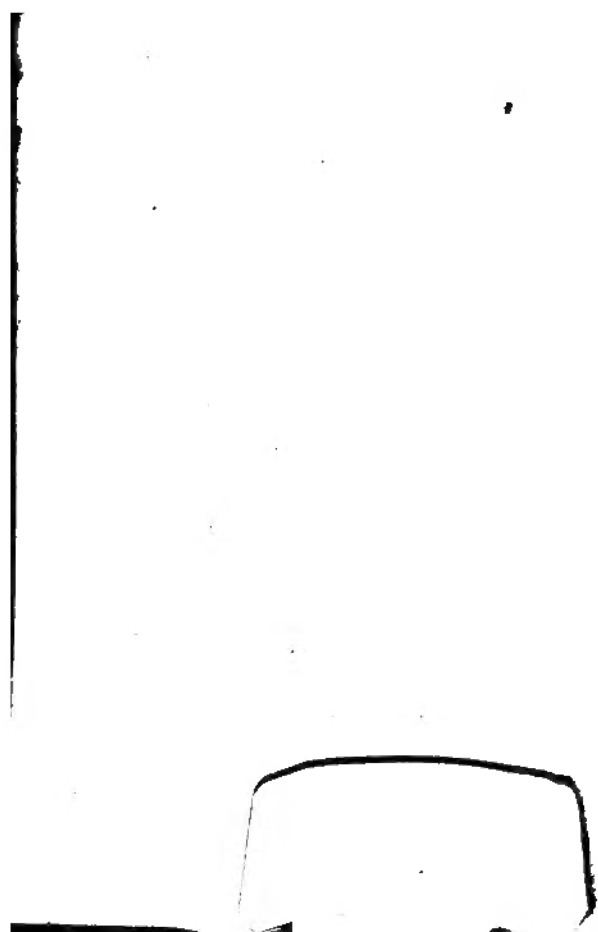
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A TREATISE
ON
NEW TRIAL
AND
APPELLATE PRACTICE

**PRESENTING AND ILLUSTRATING THE LAWS AND RULES OF PRACTICE IN
PROCEEDINGS SUBSEQUENT TO DECISIONS BY TRIAL COURTS, INCLUD-
ING FINAL DISPOSITION IN APPELLATE COURT, WITH SPECIAL
REFERENCE TO THE CODES AND STATUTES OF CALIFORNIA,
IDAHO, MONTANA, NEVADA, NORTH DAKOTA, ORE-
GON, SOUTH DAKOTA, UTAH, WASHINGTON,
WYOMING, AND THE TERRITORIES OF ARI-
ZONA AND NEW MEXICO.**

IN TWO VOLUMES.

VOLUME ONE.

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OF THE SAN FRANCISCO BAR,
Author of "Law of Private Corporations," "Trusts and Monopolies,"
"Extraordinary Relief," "Injunctions," etc.

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PREFACE.

The purpose of this work is to place before the profession a full discussion, in proper order, of the laws and rules of practice governing, and to illustrate by judicial precedents, the important subjects of New Trial and Appellate Practice. Special effort has been directed to a methodical arrangement and presentation of the statutes, established rules and decisions of the Pacific Coast states and territories, though, in an elaborate treatment of the law on any general subject in one or a few states, the result will be found of practical use in other states.

Long prior to legislation on the closely related subjects of new trial and review in higher courts, there was a tendency and a constant effort to substitute definite principles for the unrestrained discretion of nisi prius judges. But at length it was found that the end in view could only be attained by comprehensive and radical changes, constitutional and legislative. In most of the states will be found complete systems of statutory and code provisions governing these subjects, the principal duties devolving upon the courts being those of construction.

The space allotted for this great subject is so limited that there is little room for presentation of the author's individual views, and they have not been put forward except where, in the absence of adjudications on any phase of the subject, an expression of original view seemed indispensable to a complete rounding out of the work. No attempt is herein made to discuss or even to state all the relevant statutory provisions of all or any considerable number of states; nor is such discussion necessary, nor would it prove of any value if possible. Taking the statutory (code) provisions of one state (California) and citing the decisions of its own courts thereunder, and those of the other Pacific Coast states rendered under similar or identical provisions, and general authority so far as practicable, was the method here pursued, to a great extent, though the statutory provisions elsewhere have been stated where their statement was necessary for purposes of illustration, or in order to prevent misunderstanding. Hence it is of interest and serves a useful purpose to give here a brief historical résumé of the California code system.

The four codes took effect January 1, 1873. Although most of the provisions of the Practice Acts, civil and criminal, were embodied respectively in the Code of Civil Procedure and Penal

Code, yet many of them were omitted and others changed; many new sections embodying the results of many decisions suggesting or declaring rules and principles which should govern pleading practice and procedure were added. The first case in which the new legislation was referred to was that of *Matter of John J. Marks*, 45 Cal. 205, in the brief of counsel in which a provision of the Penal Code was referred to. There was no reference to any code provision in the opinion. The Code of Civil Procedure was first referred to in brief of counsel in *Caulfield v. Doe*, 45 Cal. 221. In the same case the court referred to it, citing and construing section 646. That was the first section ever mentioned by the supreme court. From that time few opinions have been written in which some code provision has not received more or less attention—those of the Code of Civil Procedure more than any other. More than one-half of volume 45 and all the subsequent volumes, over ninety-three in all to date, have been under the code régime. One who gives long and careful study to the adjudications will be surprised to find how many questions of practice are still left “in the air”; also how many questions have been put aside in order to decide the particular case on some other point, and thus avoid establishing a fixed rule which might work hardship in cases to arise afterward, and be awkward for the appellate court to deal with. He will also be surprised at the great number of questions which were apparently set at rest during the first two decades following the adoption of the codes, but have become *res integra* by divergent views, doubts, criticisms and confessions and avoidances during the present decade. So altogether one may in almost any case find authority to condemn the course pursued by his adversary or to justify his own course, in matters of practice, or find himself in a state of sufficient doubt and uncertainty to justify an appeal and learn the side on which a majority of the supreme court will array itself. Therefore, a careful analysis and arrangement of all the decisions of this state and of other states having similar procedure is of inestimable value to the practitioner.

It would be useless to discuss in this place the division and subdivision of the work which has been adopted. That will be seen and fully understood by referring to the Table of Contents.

THOMAS CARL SPELLING.

SAN FRANCISCO, September 5, 1903.

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NEW TRIAL.

PART I.

DIVISION 1. SUBSTANTIVE ELEMENTS OF THE PROCEEDING.

DIVISION 2. PROCEDURE.

DIVISION 1.

SUBSTANTIVE ELEMENTS OF THE PROCEEDING.

CHAPTER 1.

DEFINITIONS AND DISTINCTIONS.

- § 1. Code definition substantially same as at common law.
- § 2. New trial must be preceded by a trial and decision.
- § 3. The decision must be upon an issue of fact.
- § 4. The issue meant is one arising upon the pleadings.
- § 5. New trial can only be had of the issue upon which the verdict or other decision was rendered.
- § 6. Defects in pleadings and rulings pertaining thereto no ground for the proceeding.
- § 7. Proceeding must be instituted in same court.
- § 8. Correction of conclusions of law and new trial distinguished.
- § 9. New trial distinguished from mistrial.
- § 10. New trial distinguished from arrest of judgment.
- § 11. New trial distinguished from motion to quash information or indictment.
- § 12. New trial distinguished from venire de novo.
- § 13. Right to new trial not lost by motion for judgment non obstante.
- § 14. New trial an independent proceeding.
- § 15. Effect of legislation on pending proceeding.
- § 16. Applicability to trials by referees.

New Trial, Vol. I—1

§ 1. Code definition substantially same as at common law.

A new trial, as the term is used in law, is a retrial. Just why the less definite term "new trial" is used, it would be difficult and, at present, without profit, to explain. The statutory definitions in the various states will be found substantially the same. Upon comparison with the common-law definition the only differences consist in differences of phraseology. The definition given in the California Code of Civil Procedure¹ is as follows: "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court or by referees."

The only perceptible reason for using the word "re-examination" in preference to the word "retrial" is that the former is a more euphonious expression. In this instance exactitude and clearness have been sacrificed to rhetorical effect. New trial is the statutory, and therefore the exclusive and appropriate, method of re-examining issues of fact. Accordingly, it was held that a motion to amend the findings, after a decree had been entered was a practice unknown to the law.² The motion must

¹ Section 656. A new trial at common law had reference to a re-examination of fact tried by jury. Few, if any, instances can be found of a retrial of an issue of fact tried otherwise than by jury: 3 Blackstone's Commentaries, 388.

A common-law definition.—"A rehearing of the legal rights of the parties upon disputed facts, before another jury granted by the court on the motion of the party dissatisfied with the result of the previous trial, upon a proper case being presented for the purpose": 4 Chitty's General Practice, 30.

² *Pico v. Supelveda*, 66 Cal. 336, 5 Pac. 515. But erroneous conclusions of law may be corrected at any time before the entry of judgment. *Condee v. Barton*, 62 Cal. 15, the court saying: "The declaration of the general conclusion of law from the facts found is the rendition of the judgment in so far as that, when entered, the judgment entered may relate to such rendition for certain purposes, but this does not make the conclusions of law first announced final, and beyond the reach of the court."

Bixby v. Bent, 59 Cal. 532, was cited in *Curtis v. Walling*, 2 Idaho, 416, 18 Pac. 54, in support of a proposition that the court may amend its findings at any time before entering judgment. But the decision does not go that far. Such power is expressly denied in *Pico v. Supelveda*, *supra*. In *Rhodes v. Williams*, 12 Nev. 20, 24, the court said: "Of course, if it had been necessary, or even permissible for him to move for a new trial, upon receiving notice of

therefore be directed at the verdict as rendered, or the findings as filed by the court. Where a reversal was sought on the ground that in the opinion of the trial judge he had assigned as a reason for denying the motion a matter of fact not covered in the findings, as filed, it being insisted that he had thereby amended the findings, and therefore the judgment was left without support in the findings and must be reversed, the supreme court said: "But whatever the effect of the recitals in the order relied on by appellant, they did not operate to change the findings in the case as theretofore existing. After findings have been filed, and judgment entered thereon, there is but one method by which those findings can be competently changed or modified—except perhaps in respect of a mere clerical error or misprision—and that is the mode pointed out by the statute, by the granting of a new trial. Until the findings are thus set aside, they must under our present system, stand in their integrity as originally made."³ And it is the exclusive method as well in equitable actions as in actions at law.⁴

the filing of the report which has been made by the referee in this case, it would follow that his appeal from the order overruling his motion for a new trial would lie, for otherwise he might be wholly deprived of any appeal from that order by the expiration of the time within which such an appeal may be taken, before the rendition of any final judgment. But he was not required, nor could he be permitted, to move for a new trial until the issues between him and the plaintiff had been fully and finally decided. Before a party can move for a new trial, the action must have been, not partially, but fully tried, and this action has been finally and fully tried only so far as Maria Williams is concerned. The fact that she and her husband joined in the motion and in this appeal does not invalidate the motion or the appeal, so far as she is concerned, nor will it prevent him from making his motion, and taking his appeal when the proper time arrives."

³ *Hawthurst v. Rathgeb*, 119 Cal. 531, 532, 63 Am. St. Rep. 142, 51 Pac. 846. See, also, *Thompson v. White*, 63 Cal. 505, 509, holding that findings upon which interlocutory order is made can only be attacked upon final decision, and then either on appeal from the judgment, or on motion for new trial. In the same case upon a second appeal (76 Cal. 381, 383, 18 Pac. 399), the court limited or explained the language used by it on the former appeal to the effect that an interlocutory decree could be modified by the findings made in the final decision, and that inconsistency between the interlocutory decree and final decree is immaterial.

⁴ *Doe v. Vallejo*, 29 Cal. 386, 390; *Duff v. Fisher*, 15 Cal. 375;

§ 2. New trial must be preceded by a trial and decision.

It is a "re-examination," a retrial. It cannot be initiated or entertained until after the completion of a former trial. And to test the question whether there has been a former trial and whether such former trial has been completed is to ask and answer this question, Has there been a decision? It must be constantly borne in mind that not every decision terminates a trial. In a general sense every ruling on a motion and on the admissibility of evidence is a decision. But the decision designated in the code in connection with new trials is a decision rendered upon a trial of an issue of fact. Motion for new trial can only be entertained "after a trial and decision." "A determination of an issue of fact is the verdict or decision, which is sought to be set aside when a new trial is asked, under the code";⁵ and the decision meant by the code is a decision of the issues as to all the parties before the court; and where no verdict had been rendered for or against one of the defendants, it was held that the motion for a new trial was premature and that it was error to grant it. The court reasoned thus: "It may be that there was a mistrial or not a trial as to defendant Morgan, and that the court below may hereafter proceed to try the case as to him; but there was no cause for a motion for new trial, or for an application to vacate the former decision."⁶

Deputy v. Stapleford, 19 Cal. 302; Thompson v. White, 63 Cal. 505, 509; Harris v. San Francisco Sugar Ref. Co., 41 Cal. 393; Campbell v. Jones, 41 Cal. 515, 519; Gagliardo v. Hoberlin, 18 Cal. 396; Burnett v. Pacheco, 27 Cal. 411; Green v. Butler, 26 Cal. 399; Allen v. Fennon, 27 Cal. 69, 85 Am. Dec. 238; People v. Banvard, 27 Cal. 475; Reed v. Bernal, 40 Cal. 630; Whitmore v. Shiverick, 3 Nev. 303; Burbank v. Riera, 20 Nev. 81, 84, 16 Pac. 430; Silva v. Pickard, 14 Utah, 264, 27 Pac. 144; Federico v. Hancock, 1 Ariz. 512, 25 Pac. 650; Allport v. Kelly, 2 Mont. 344.

⁵ Harris v. San Francisco Sugar Refining Co., 41 Cal. 393, 404, per Temple, J. The statute does not contemplate a motion for a new trial until all of the issues have been passed upon: People v. Smith, 121 Cal. 355, 53 Pac. 802. See, also, People v. Majors, 65 Cal. 100, 3 Pac. 401.

⁶ Benjamin v. Stewart, 61 Cal. 605. In Bankin v. Central Pac. R. Co., 73 Cal. 93, 94, 15 Pac. 57, the jury had returned a verdict against one of two defendants jointly sued as tort-feasors, but which was silent as to the other, whereupon the defendant against whom judgment was rendered appealed. The supreme court held on author-

And the same rule, and the reasoning in its support, hold good where there has been a reference ordered. A motion for new trial before the final report of the referee is premature,⁷ and in other cases where in any respect the trial has not been completed by a disposal of all the issues and matters before the court in the action.⁸ And since the special findings of a jury in an equity case are merely advisory, a motion for new trial upon the rendition of the verdict is premature.⁹ The authorities

of *Benjamin v. Stewart*, that the appeal was premature, prior to a disposal of the issue as to the other defendant.

⁷ *Crowther v. Rowlandson*, 27 Cal. 376, 385; *Harris v. San Francisco Sugar Ref. Co.*, 41 Cal. 393, 406; *Hinds v. Gage*, 56 Cal. 486, 488; *Duff v. Duff*, 71 Cal. 513, 519, 12 Pac. 570.

If a new proceeding for a new trial be instituted after final judgment, the error or irregularity of instituting the motion prematurely is obviated or cured: Thus, in the first case above cited, the court said: "As the defendants renewed their notice of motion for a new trial after the report was filed, and on a new statement, a decision of the point upon which we have just passed is of no practical consequence, except as it bears upon the regularity and effect of the referee's report as a proceeding in the case."

⁸ See *Bixby v. Bent*, 59 Cal. 532, holding that the trial in a partition suit was not ended during the pendency of proceedings for a modification of the decree which had been made: *Rhodes v. Williams*, 2 Nev. 26, holding the trial not ended, because the decree had directed an accounting and sale. But see *Arnold v. Sinclair*, 11 Mont. 567, 28 Am. St. Rep. 489, 29 Pac. 340, holding that a reference after judgment does not affect finality of judgment.

⁹ *Bates v. Gage*, 49 Cal. 126, 128; *Spottiswood v. Weir*, 66 Cal. 529, 6 Pac. 381. That verdict in equity case advisory merely, see *Haggin v. Raymond*, 67 Cal. 303, 7 Pac. 721; *Smith v. Richardson*, 2 Utah, 427. It seems to be immaterial, as regards this quotation, how the equitable issue in which a jury trial is had is raised. In *Duffy v. Moran*, 12 Nev. 89, 97, it was raised by the answer. The court said: "Defendant admitted that the legal title was in plaintiff, but against that set up an equity which he claimed was superior to the legal title. Whether or not that equity existed was the only question in the case, and upon that neither party could have demanded a jury. In such a case, when there are contested questions of fact, the chancellor may, and oftentimes should, call a jury to assist him at arriving at a just conclusion, but the verdict is merely advisory, and only to satisfy his conscience. If he is not satisfied with it, he can and should disregard it. If it is satisfactory, he can and should adopt it, and file his findings and decree accordingly. . . . In a chancery suit the action is not 'tried' until the verdict

are uniformly to the effect that the verdict of a jury in an equity case, whether covering all the issues or part only, is advisory merely. If general, covering all the issues, the court must adopt the verdict as its findings or make findings, unless waived.¹⁰

Having thus ascertained the character of the decision which precedes a proceeding for new trial, it is in order to define that which must precede the decision. The re-examination reaches back to and begins at the pleadings; and the issue of fact referred to in the definition to be re-examined is one raised by the pleadings.¹¹ A trial is the examination before a competent tribunal, according to the law of the land, of the facts or a question of law put in issue in a cause, for the purpose of determining such issue.¹² But in case of a trial by the court without a jury, until a decision has been entered in the minutes, or reduced to writing by the judge and signed by him and filed with the

has been 'sanctioned and established' by the chancellor. In this case it was not tried until after the argument of counsel, 'as to what the judgment should be.' There is nothing in the transcript showing that the court submitted to the jury anything but the special issues stated, and, it being a case of purely equitable cognizance, we cannot presume the court called the jury for any other purpose except to be advised by it." See, also, *Lake v. Tolles*, 8 Nev. 285; *Van Fleet v. Olin*, 4 Nev. 98.

¹⁰ *Warring v. Freear*, 64 Cal. 54, 56, 28 Pac. 115; *Learned v. Castle*, 67 Cal. 42, 7 Pac. 34; *Bell v. Marsh*, 80 Cal. 414, 22 Pac. 170; *Simpson v. Harris*, 21 Nev. 376, 31 Pac. 1008, holding, however, that the error was waived because there was no objection to the course pursued. See, also, *Duffy v. Moran*, 12 Nev. 94; *Stockman v. Riverside Irr. Co.*, 64 Cal. 57, 28 Pac. 116.

¹¹ See post, § 4.

¹² *Anderson v. Pennie*, 32 Cal. 265; *Tregambo v. Comanche etc. Co.*, 57 Cal. 501; *Finn v. Spagnoli*, 67 Cal. 33, 7 Pac. 746; *Van Meter v. Barnett*, 119 Ind. 38. From this definition it is seen that there may be a trial which cannot be followed by a new trial, within the statutory definition. But there may be a bill of exceptions for use on appeal from the decision resulting from the trial of an issue of law: *Reddington v. Cornwell*, 90 Cal. 49; 27 Pac. 40. In *Tregambo v. Comanche etc. Co.*, supra, the term "trial" was applied to a hearing on affidavits of a motion to set aside a default. In this, and also in *Finn v. Spagnoli*, the hearing was held to come within the term with reference to its use in section 650, pertaining to the time limited for presenting a bill of exceptions.

clerk, a case has not been tried.¹³ If the verdict is special, not covering all the issues, the court must hear the evidence and make findings on issues not submitted to the jury. In *Warring v. Freear*,¹⁴ the court said: "Upon adopting the verdict, it became the equivalent of a finding by the court, but it did not cover the issues raised by the pleadings. Where the verdict of a jury, in an equity case, does not respond to all the issues, it becomes the duty of the court, if it adopts the verdict as far as it is responsive to the issues, to proceed and find, upon the evidence which has been given and any other which may be offered by the parties, as to the other issues not covered by the verdict and to make and file its decision in writing, stating the facts found and the conclusions of law drawn therefrom, as required by sections 632 and 633 of the Code of Civil Procedure. Until such a decision has been made and filed, the case cannot be considered as tried unless the filing of such a decision has been waived. There was no waiver of findings in this case; and as the court failed to ascertain and determine the rights of each of the parties to the use of the water of the stream in controversy, the judgment and order denying the motion for a new trial must be reversed and the cause remanded for a new trial." The word "decision" has the same meaning in Indiana under similar statutes as those of California; and "decision" is equivalent to "finding" where the action is tried by the court.¹⁵ In a case tried by a jury, every step taken for the purpose of determining the issue of fact joined between the parties, up to and including the verdict, upon such issue, must be regarded as

¹³ *Hastings v. Hastings*, 31 Cal. 95; *Warring v. Freear*, 64 Cal. 54, 56, 24 Pac. 115; *Conolly v. Ashworth*, 98 Cal. 203, 206, 33 Pac. 606; *Broder v. Conklin*, 98 Cal. 360, 362, 33 Pac. 211. In the last case, the trial judge filed his findings of fact and certain conclusions of law in an action tried before him, in which he found "that the plaintiffs herein are entitled to judgment," but qualified that conclusion by adding as a closing direction that "counsel will prepare an interlocutory judgment in favor of the plaintiffs, directing a reference to a commissioner to be appointed by the court to take an account between the parties." It was held that it sufficiently appeared that at the time of the filing of such findings of fact and conclusions of law, the trial of the action was not completed.

¹⁴ 64 Cal. 54, 56, 28 Pac. 115.

¹⁵ *Weaver v. Apple*, 147 Ind. 304, 46 N. E. 642.

"arising during the course of the trial";¹⁶ and yet, although the court excludes all evidence on the part of the plaintiff, and renders a judgment for the defendant, a trial is had in the sense in which the court may grant a new trial, on application of the plaintiff.¹⁷

§ 3. The decision must be upon an issue of fact.

The definition in terms limits the re-examination upon new trial to issues of fact. The meaning of this seems clear, but some difficulty has been encountered in distinguishing between issues of fact and issues of law. The fundamental proposition is that a motion for a new trial should not be made unless, nor until, an issue of fact has been determined.¹⁸ Where a party has defaulted, the only question presented is legal, and there is no place for a motion for new trial,¹⁹ and this proposition holds good although a statute requires the court to hear evidence, notwithstanding the default, for instance in divorce cases. Such statutes merely declare the policy of the law, but are not to be construed as raising "issues of fact" in case of default nor as constituting the taking of proof, where the defendant has not answered a "trial," as those terms are now used in the provisions relating to new trials. The re-examination or an issue of fact, provided for in section 656 of the Code of Civil Procedure, is to be had only where there has been a trial of an issue arising where a material averment made on the one side

¹⁶ *People v. Turner*, 39 Cal. 370. Ordering a party to give testimony prior to the trial, as on discovery, and requiring him to submit to a medical examination before the trial, are not "errors in law occurring at the trial" presentable on motion for new trial: *Pfaffenbach v. Lake Shore etc. Ry. Co.*, 142 Ind. 246, 41 N. E. 530. Further as to what errors deemed to occur during the trial, see, post, chapters 14, 15, 16, 17.

¹⁷ *Moore v. Bates*, 46 Cal. 30, 31.

¹⁸ See *Foley v. Foley*, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122; *Clayton v. Smith*, 1 Colo. 95; *Phelps v. Spruance*, Id.; *People v. George*, 3 Idaho, 108, 27 Pac. 680, holding that on petition for a writ of mandamus, to which a demurrer was filed, there could be no new trial, since all the facts were admitted by the demurrer.

¹⁹ *Savings etc. Soc. v. Meeka*, 66 Cal. 371, 5 Pac. 624. Nor is the setting aside a default, and giving defendant leave to file and answer in defense the granting of a new trial: *Freeman v. Ambrose*, 12 Wash. 1, 40 Pac. 381.

is controverted on the other, as provided in sections 588 and 590 of the same code. The only remedy where a defendant has made default and suffered judgment upon an ex parte showing is by motion under section 473 of the Code of Civil Procedure, and not by motion for a new trial. Attempted proceedings for a new trial in such cases are nugatory.²⁰

§ 4. The issue meant is one arising upon the pleadings.

The issue of fact meant in the definition must be such an issue arising on the pleadings.²¹ In *Harris v. San Francisco Sugar Refining Company*,²² an account had been referred for

²⁰ *Foley v. Foley*, 120 Cal. 33. In this case, the appellant contended that in divorce cases there was always a trial of necessity of issues of fact; that the law raised such issues whether the defendant answered or not. The court refused to support this view and said: "The court does not provide that no divorce can be granted upon the mere default of the defendant, but that the court shall, in all cases, 'require proof of the facts alleged' before granting the relief: Civ. Code, § 130. But the effect of that provision is not to raise 'issues of fact,' nor to constitute the taking of proof submitted by the plaintiff in cases where the defendant has not answered a 'trial,' as those terms are used in the provisions relating to new trials. Such an issue arises only where a material averment of fact is made on the one side, and is controverted upon the other (Code Civ. Proc., §§ 588, 590); and the 're-examination' provided for in section 656 is where there has been a trial of such an issue. The provision of the Civil Code merely declares the policy of the law to be that in divorce cases, whether the defendant suffer or not, the relief shall not be granted until the facts upon which it is sought are established by proof. In such an instance, however, as in any other where the defendant makes default and suffers judgment upon a mere ex parte showing, his remedy in seeking relief from the judgment is under section 473 of the Code of Civil Procedure, and not by motion for a new trial."

²¹ *Harper v. Hildreth*, 99 Cal. 265, 270, 33 Pac. 1103; *Harris v. San Francisco Sugar Ref. Co.*, 41 Cal. 393, 404, 406; *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364; *Solomon v. Fuller*, 14 Nev. 63; *Beach v. Spokane etc. W. Co.*, 21 Mont. 7, 52 Pac. 560. A delay of more than six months in the filing of findings, in an action of divorce, after judgment was ordered for the defendant, is not ground for a new trial, and cannot be considered upon appeal from an order denying a new trial to the plaintiff: *Kepfler v. Kepfler*, 134 Cal. 205, 66 Pac. 208.

²² 41 Cal. 393-407. See, also, *Zickler v. Deegan*, 16 Mont. 198, 40 Pac. 410, where in an action against the defendant as lessee of

the purpose of ascertaining a balance, all other matters being reserved, pending the report of the referee. The referee filed his report, finding a balance against the defendants, who filed exceptions to the report. No notice of motion for new trial was given until within ten days after the confirmation of the report. It was held that the motion was in time. Temple, J., delivering the opinion, said: "It is very true that an accounting was contemplated by the plaintiff, and is a portion of the relief sought by him. Still the issue raised by the pleadings upon this subject was his right to have an account taken, and the principles upon which the account should be taken, if at all, was not settled by the pleadings, but the accounting ordered may have been very different from that claimed. In this case the plaintiff might have claimed an account of the profits made by the company, while the accounts ordered may have been the dividends made. The referee, in taking the account and stating a balance, was not governed by the pleadings, but by the interlocutory decree. The question as to the correctness of his report was not, whether he had correctly tried the issue made by the parties, but whether he had correctly tried the question referred to him by the court. His guidance was not the pleadings, but the order of reference. The issue had not been sent to him to try, but he examined a certain matter of fact under the instruction of the court, and for the information of the court before whom the trial was being had. If his report furnished the information sought, the court could act upon it; otherwise a new reference might have been made, and so on, until the desired information was had. I think, therefore, the proceedings before the referee in this case was not a trial within the meaning of the one hundred and ninety-fifth section of the Practice Act."

For the same reason, where all the facts are agreed upon, there is no issue of fact to be re-examined, and no ground for a new trial.²³ Nor is a motion for a judgment pursuant to a stipulation a trial of the case upon the merits. If a party to such

a mine for failure to account for the profits thereof to the plaintiff, it was held that the claim of defendant that the plaintiff acquiesced in the former's method of accounting could not be urged as ground for a new trial, no facts having been pleaded showing any such acquiescence, so as to constitute a waiver.

²³ Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; McMenemy v. White, 115 Cal. 339, 343, 47 Pac. 109.

stipulation is entitled to judgment it is upon the stipulation, and not upon a trial of the cause. A motion for new trial in such case is irregular and should be dismissed.²⁴ The same rule is applied where some of the findings are outside the issues made by the pleadings, however much they may affect the interests of a party; and a new trial cannot be granted on findings which relate to matters of enforcement of the judgment given thereon. Thus it was held that a new trial could not be granted on a finding that certain property was subject to a judgment for costs.²⁵ On the same principle, it was held that a new trial should not be granted because the court had erred in the finding of a fact relating to a preliminary proceeding in the case, where such ruling was specified merely as an error occurring during the trial.²⁶ But the proposition that the issue to be re-examined must be one arising upon the pleadings requires some qualification, or, rather, explanation. It will be seen, in its proper place, that statutes specifying grounds for new trial almost invariably specify many matters which the most liberal construction could not bring within the scope of the pleadings in any case. Therefore, it is necessary to distinguish between the subject matter to be re-examined and the reasons, or grounds, assigned, in any given case, for such re-examination. These entitle the party to a re-examination, or new trial, because their existence or occurrence have affected the verdict or decision on the issues.

§ 5. New trial can only be had of the issue upon which the verdict or decision was rendered.

It is also a fundamental principle herein, but slightly distinguishable from that discussed in the last preceding section, that a party defendant, having by his pleading made a defense by

²⁴ *Gillmore v. American etc. Ins. Co.*, 65 Cal. 63, 66, 2 Pac. 882.

²⁵ *Ray v. Atlanta Banking Co.*, 110 Ga. 305, 35 S. E. 117. If the trial judge makes inquiry into matters not shown at the trial, though improper, yet it is no ground for new trial: *State v. Huff*, 76 Iowa, 200, 40 N. W. 720.

²⁶ *Solomon v. Fuller*, 14 Nev. 63, 65. The order in this case was on a matter which was not and could not have been submitted to the jury. If erroneous, it could not be corrected on motion for new trial. The court strongly intimates that the party mistook his remedy.

way of confession and avoidance, cannot resort to a motion for new trial for the purpose of setting up new defenses to the action. Accordingly, it was held in a suit against a county on a note, the defendant having made no defense thereto, but having set up a counterclaim, that it could not after verdict against it, in a proceeding for a new trial, contend that the note constituted an increase of its indebtedness, and therefore was void for want of the statement required by a certain statute.²⁷

§ 6. Defects in pleadings and rulings pertaining thereto, no ground for the proceeding.

A motion for a new trial is not available procedure for reaching defects in pleadings. And where judgment has been entered upon demurrer to the complaint, an error in its ruling can only be corrected upon appeal from the judgment. A motion for a new trial is not permissible for the purpose of correcting such error, and an order denying a new trial will be affirmed upon appeal therefrom, without considering the merits of the demurrer.²⁸ Nor can any question as to the legal sufficiency of an indictment be raised on a motion for a new trial.²⁹ It has been held in Arizona that failure of a complaint to state a cause of action may be availed of on motion for a new trial.³⁰ But the reasoning, no less than the great preponderance of authority, sustains the opposite view. The same question was considered

²⁷ *Safe Deposit Bank v. Schuylkill County*, 190 Pa. St. 188, 42 Atl. 539.

²⁸ *Jones v. Chalfant*, 128 Cal. 334, 60 Pac. 852; *Mason v. Austin*, 46 Cal. 385, 387. See, also, *Jacks v. Buell*, 47 Cal. 162, 163; *Spanagel v. Dellinger*, 38 Cal. 278, 283; *Onderdonk v. San Francisco*, 75 Cal. 534, 539, 17 Pac. 678; *Wheeler v. Kassabaum*, 76 Cal. 90, 92, 18 Pac. 119; *Jenkins v. Frink*, 30 Cal. 585, 595; *Ross v. Wait*, 2 S. Dak. 640, 51 N. W. 866; *Krantz v. Rio Grande etc. Co.*, 13 Utah, 3, 43 Pac. 623; *Perkins v. McDowell*, 3 Wyo. 328, 28 Pac. 71. Objection that complaint fails to state a cause of action may, indeed, be raised at any time, but not in this form: *Spanagel v. Dellinger*, *supra*.

²⁹ *Womble v. State*, 107 Ga. 666, 33 S. E. 630. It is error in a criminal case to grant defendant's motion for a new trial on the ground that the information therein is not properly subscribed: *State v. Schnepel*, 23 Mont. 523, 59 Pac. 927.

³⁰ *Consolidated Canal Co. v. Peters (Ariz.)*, 46 Pac. 74.

in *Spanagel v. Dellinger*,³¹ the appeal from the judgment having been dismissed, and the appeal from the order denying a new trial being the only matter before the court. In affirming the order denying the motion the court said: "The object of the motion for new trial is to get rid of the verdict or finding. The statement only presents the action of the court during the progress of the trial of the issues joined, and affecting the verdict or finding on the issues; it in no way presents any question as to the sufficiency of the complaint to constitute a cause of action. Such questions can only be raised on an appeal from the judgment. The question as to the total insufficiency of the complaint may, it is true, be taken at any stage of the case—that is to say, in any stage of the proceeding which presents the question; but the statement on a motion for new trial, or the record on a mere appeal from an order denying a new trial, does not and cannot properly present the question."

The same line of reasoning opposes the proposition that a motion for new trial is the appropriate or is any remedy for failure of a complaint to state a cause of action; and, in addition, it may usually be shown that there are other methods of objecting, even after judgment. Any not then existing will be deemed to have been waived by failure to demur or object to evidence. Nonjoinder of parties must be raised by plea in abatement, or by demurrer or by objection when the nonjoinder appears on the trial and cannot be first raised on the motion for a new trial.³² But there is a distinction between questions which affect the sufficiency of the pleadings, as such, and errors committed by the court during the trial, by reason of an erroneous construction of pleadings. Accordingly, where the original complaint showed on its face that the cause of action therein stated was not barred by the statute of limitations at the time suit was brought, and an amended complaint introduced no new cause of action, it was held proper for the trial court to grant a new trial because of an erroneous ruling

³¹ 38 Cal. 278, 283. See, also, *Martin v. Matfield*, 49 Cal. 45; *In re Doyle*, 73 Cal. 571, 15 Pac. 125; *Brisson v. Brisson*, 90 Cal. 323, 326, 27 Pac. 186; *Taylor v. Hill*, 115 Cal. 143, 147, 44 Pac. 336, 46 Pac. 922; *Mason v. Barkley* (Ind. App.), 51 N. E. 946, as to how sufficiency of a pleading may be tested on motion for new trial. See *Alpers v. Hunt*, 86 Cal. 82, 21 Am. St. Rep. 17, 24 Pac. 846.

³² *Brackenridge v. Claridge* (Tex. Civ. App.), 42 S. W. 1005.

that the cause of action set out in the amended complaint was barred by the statute of limitations.³³ And where an answer, which was not demurred to set up new matter and evidence was offered by a defendant, but objected to because the defense was not properly pleaded, and the court overruled the objection and admitted the evidence, but after the trial had closed changed its mind and disregarded the evidence because the defense was not properly pleaded, the defendant was held entitled to a new trial.³⁴ It is also sometimes important to distinguish between an assignment of error specifying a defective pleading or a ruling on motion to strike out, as a ground, and errors in ruling on the admissibility of evidence under defective pleading as a ground for the motion, errors in law occurring at the trial being one of the statutory grounds. Thus in *Wangenheim v. Graham*,³⁵ the plaintiff relied upon the refusal of the court to strike out portions of the answer, purporting to set up a counterclaim, and also relied upon the rulings of the trial court admitting evidence offered to prove a counterclaim on the ground that if proved the facts averred did not constitute any defense to the action, nor a sufficient basis in law for a counterclaim or cross complaint. In passing upon the point, reversing the judgment, and ordering a new trial, the court said: "It is well established in this court that if a pleading contains no cause of action or defense, the adverse party may object at the trial to the proof of the facts alleged, on the ground that, if proved, they would not avail the party. It would be a vain thing to consume the time of the court in making proof of facts which, when established, show no cause of action or defense, as the case may be. If, therefore, the counterclaim or cross-complaint, on its face, exhibited no defense to the action,

³³ *Smullen v. Phillips*, 92 Cal. 408, 28 Pac. 442.

³⁴ *Carpenter v. Small*, 35 Cal. 246. A portion of the original opinion in this case was omitted in the opinion on rehearing referred to in *Meacham v. McKay*, 37 Cal. 165.

³⁵ 39 Cal. 169, 175. If in such a case the pleading being sufficient, the court should erroneously exclude all the evidence offered to prove its allegations, it would still constitute a trial, and for the error in excluding the evidence the party offering the evidence, having properly excepted, would be entitled to a new trial: *Moore v. Bates*, 46 Cal. 30.

nor any cause of action against the plaintiff which could avail the defendant as a counterclaim or cross-complaint under the Practice Act, the court ought to have excluded the proof offered to support it; and if it erred in this respect, the error was a proper ground for new trial." The last preceding illustration brings to mind an important distinction in connection with the rule which bars from the consideration of the court on motion for new trial questions pertaining to the sufficiency of the pleadings. It only goes to the extent of excluding the renewal of questions which have been, or which might have been, disposed of on demurrer, by plea in abatement, motion to strike out, and the like. The fact that defectiveness in a pleading gives force and effect to an objection to evidence, to a request for an instruction, or to a motion for nonsuit, does not deprive the party of the benefit of an erroneous ruling on such objection, request or ruling. In *Alpers v. Hunt*,³⁶ the court said: "If the court below had on the trial committed an error for which it was proper, on its being regularly brought before it, to grant a new trial, this court would approve and affirm the action of such court granting such relief. If, on the contrary, no such error had been committed, if the court below had on the trial before it ruled correctly, this court would, in accordance with such view, hold the order granting a new trial erroneous, and reverse it. This is the usual course of practice in the courts of this state, and we see nothing in it foreign to the procedure prescribed by law. It has been a practice, not unusual in our courts, to ask a trial court to instruct the jury, when the complaint did not state facts sufficient to constitute a cause of action, to find a verdict for defendant. Whether given or refused, such ruling could be reviewed on motion for a new trial; and on the hearing of this latter motion, whether favorable or adverse to the motion, an appeal could be prosecuted from the order granting or refusing the new trial, and the action of the trial court passed on in this court and either approved or set aside. We see nothing irregular here in having the question made on the motion for a nonsuit considered and passed on in this court, though it does go to the sufficiency or insufficiency of the complaint. The question comes before us in the regular course of procedure, and the legal exigencies of the case demand that it be considered and determined. If this court failed to pass on the point, it would in

³⁶ 86 Cal. 78, 83, 24 Pac. 846.

effect hold that there was error of law occurring at the trial, and there excepted to, which could not be reviewed on a motion for a new trial, and that, too, when the statute regulating the procedure in our courts had provided that all such errors should be so reviewed. There is nothing in the cases cited by counsel for appellant in conflict with what is stated above."

§ 7. Proceeding must be instituted in same court.

In the code definitions the words "in the same court" are generally used. The requirement that the re-examination must be in the same court governs the motion or other proceeding to obtain a new trial, which must be initiated and prosecuted in the court having jurisdiction of the action or special proceeding in which new trial is sought. In *People v. Holloway*,³⁷ a writ of mandamus was applied for in the supreme court. Issues of fact were sent to the district court of Napa county for trial, as permitted by the statute. The party against whom the verdict was rendered on these issues moved for new trial in the district court. Pending the motion for new trial the verdict was certified to the supreme court. The party in whose favor the verdict was rendered moved in the supreme court for judgment on the verdict, which was granted, the court holding that the motion for new trial should have been made in the supreme court and not in the district court.

§ 8. Correction of conclusions of law, and new trial distinguished.

In the absence of a statutory provision courts have no further jurisdiction in an action after the filing of findings and conclusions of law. The final act of entering the judgment devolves upon the clerk, being purely ministerial. The only remedy, therefore, in California for erroneous conclusions of law, resulting in an erroneous judgment was, prior to 1897, an appeal from the judgment. The error could not be reached on motion for new trial. At the session of 1880 the legislature had repealed the original section numbered 663; and in 1897 it enacted a new section having the same number; also added a new section, 663½. These sections are as follows:

"663. A judgment or decree of a superior court, when based upon findings of fact made by the court, or the special verdict

³⁷ 41 Cal. 409.

of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following cases, materially affecting the substantial rights of such party and entitling him to a different judgment: 1. Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact; and in such case when the judgment is set aside the conclusions of law shall be amended and corrected; 2. A judgment or decree not consistent with or not supported by the special verdict.

"663½. The party intending to make the motion mentioned in the last section must, within ten days after notice of the rendition of judgment or decree, serve upon the adverse party and file with the clerk of the court a notice of his intention, designating the ground upon which the motion will be made, and specifying the particulars in which the conclusions of law are not consistent with the finding of facts, or in which the judgment or decree is not consistent with the special verdict. The said party must, within sixty days after giving such notice of intention, make the motion to the court, after giving due notice of the time of making such motion to the adverse party; but the hearing or consideration of such motion may be further continued by the court."

This remedy for correction of error does not in any sense or to any degree supersede that afforded by proceedings for new trial. They are cumulative and may be both instituted and prosecuted together and at the same time. In *Patch v. Miller*³⁸, a motion was made under the provisions of these sections and from the ruling on the motion an appeal was successfully prosecuted, and the lower court directed to correct its conclusions of law to conform to the view of the supreme court, based on the findings. In *Simons v. Hamilton*,³⁹ *McKee, J.*, delivering the opinion, expressed the view that a new trial should be granted for an erroneous conclusion of law. Three justices concurred in the result reached upon another ground, which in their opinion justified the court in granting a new trial without adopting the

³⁸ 125 Cal. 241, 57 Pac. 986.

³⁹ 56 Cal. 495. The case of *Marshall v. Golden Fleece M. Co.*, 16 Nev. 156, has been sometimes referred to as approving and following *Simmons v. Hamilton*; but an examination of the opinion and decision disclose that it does not. The court affirmed the order granting a new trial on other and sufficient grounds.

view expressed in the opinion. Justice Ross dissented. The doctrine of this case was expressly repudiated in the case of *In re Doyle*.⁴⁰ It is well settled that no motion for new trial is necessary to reach defects apparent on the face of the findings;⁴¹ and a new trial should not be granted on the ground that the findings do not support the judgment or conclusions of law.⁴²

§ 9. New trial distinguished from mistrial.

A mistrial occurs when during the progress of the trial something occurs, or it is discovered that something exists, which renders the trial ineffective and it is corrected by a retrial of the case, in part or entirely, and without proceeding to an abortive decision. If in such case a verdict or decision were reached, the only way to correct the error or irregularity would be in arrest of judgment or by a new trial. A mistrial may, like the granting of a new trial, necessitate the retrial of almost or quite an entire case, whereas a new trial occurs after the decision, and does necessitate an absolute retrial *de novo* of at least an entire cause of action. The most frequent instance of mistrial is the sickness of a juror, so serious as to prevent the trial proceeding, but many other matters may occur having the same effect.⁴³

⁴⁰ 73 Cal. 563, 572, 15 Pac. 130, holding also that where the facts of the complaint are admitted and found as alleged, there is no place for a new trial. See, also, *Hunter v. Milam*, 133 Cal. 601, 55 Pac. 1079; *Welch v. Sargent*, 127 Cal. 72, 39 Pac. 319; *Schroeder v. Pisis*, 128 Cal. 209, 60 Pac. 758; *Shepard v. McNeil*, 38 Cal. 72, 74; *McKenzie v. Bismarck Water Co.*, 6 N. Dak. 361, 71 N. W. 608. Inferentially the same conclusion was reached in *Jenkins v. Frink*, 30 Cal. 586, 595, 89 Am. Dec. 134. The force and effect of the decision appears to have been overlooked in subsequent cases.

⁴¹ *California Nat. Bank of San Diego v. Ginty*, 108 Cal. 148, 153, 41 Pac. 38.

⁴² *In re Doyle*, 73 Cal. 563, 572, 15 Pac. 125; *Brison v. Brison*, 90 Cal. 328, 27 Pac. 186; *Kirman v. Hunnewill*, 93 Cal. 526, 29 Pac. 124; *Pacific etc. Co. v. Fisher*, 106 Cal. 236, 39 Pac. 758. See, also, the other cases cited in last two preceding notes.

⁴³ See Cal. Pen. Code, § 1123; *People v. Stewart*, 64 Cal. 60, 28 Pac. 112; *People v. Brady*, 72 Cal. 490, 14 Pac. 202; Mont. Pen. Code, § 2101. The case of *People v. Zeigler*, 135 Cal. 462, 67 Pac. 754, was an instance of a mistrial—sick juror. Court held trial should begin anew.

§ 10. New trial distinguished from arrest of judgment.

A motion for new trial presupposes a sufficient valid indictment or other pleading upon which, with sufficient legal evidence in support of its allegations, a legal verdict, or other decision, and a valid binding judgment may be pronounced. A retrial upon an insufficient pleading would be an idle and vain performance, and the law has provided shorter, less expensive summary methods of making objections thereto effective than that afforded by new trial. The object and purpose of a retrial is not the correction of errors, or the prevention of further abortive proceedings which may be corrected or prevented without a retrial, but to afford an opportunity to the court to avoid the errors and irregularities occurring on the former trial to the prejudice of the party applying therefor. In *Powder River Co. v. Commissioners of Custer County*,⁴⁴ the defendant had moved before the trial for judgment on the pleadings. The court denied the motion, and the action of the court was enumerated as "one of the errors of law occurring during the trial," in the specification of errors attached to the statement on motion for new trial. The supreme court held that, inasmuch as it was an order of court made before the trial, it could not be an "error of law occurring during the progress of the trial"; and therefore was not an error of law which could be made a ground for new trial. But the stage at which the order was made would seem to be wholly immaterial, since if the party was entitled to have his

⁴⁴ 9 Mont. 145, 148, 22 Pac. 383. And in *Scherrer v. Hale*, 9 Mont. 63, 64, 22 Pac. 151, the court said: "It is urged, however, that the pleadings are properly before us, and that we can consider the order of the court below in striking out a portion of the answer. This alleged error is contained in the specification of errors attached to the statement on motion for new trial, and is referred to as 'an error of law occurring at the trial.' It is sufficient to say that this was not an 'error of law occurring during the trial,' and therefore was not such an error of law as could be considered on a motion for a new trial. There may be an exception to this rule in those cases where a motion to change a pleading is acted upon during the trial; but the order in this case was made before trial, and can be reviewed only upon an appeal from the judgment itself. It will be seen from an inspection of the authorities that the phrase 'error of law occurring during the trial,' refers to such errors as are strictly errors of laws, and not errors involving discretion, and that is confined strictly to errors occurring during the trial of the cause."

motion granted, it would have been proper at any stage, even after verdict or decision, in arrest of judgment. A motion in arrest of judgment is proper whenever the indictment complaint, or petition, does not entitle the plaintiff to relief.⁴⁵

So where the error is not in the trial, but in the entry of the judgment, there is nothing to require a new trial.⁴⁶ But in jurisdictions where a motion for new trial precedes and must be disposed of before the entry of judgment, the motion for new trial should be made before a motion in arrest.⁴⁷ And it was held that where defendant's motions in arrest of judgment and for new trial were made at the same time, the latter was waived, and hence he could not question the findings of the jury on the evidence.⁴⁸ It is undoubtedly safer practice, if there be any doubt on the question, to file the motion for new trial one day and the motion in arrest on a later day.⁴⁹ It is held that a judgment will not be vacated upon grounds that have been already passed upon by the court in denying a motion for a new trial.⁵⁰ But this view is subject to some qualification. Judgments are often vacated in equity for extrinsic fraud and mistake upon new facts which were beyond the reach of the party at the trial.⁵¹

§ 11. New trial distinguished from motion to quash information or indictment.

Applications for new trial have been sometimes made on the ground of irregularities in the proceedings against defendants in criminal cases precedent to the filing of an information or finding of an indictment. It is obvious that such objection cannot be made available in that form, being antecedent to the acquisi-

⁴⁵ *People v. Ross*, 103 Cal. 425, 428, 37 Pac. 379; *People v. Wong Wang*, 92 Cal. 277, 28 Pac. 270; *People v. Turner*, 39 Cal. 370; *Kirk v. Litteral*, 71 Iowa, 71, 32 N. W. 106.

⁴⁶ *Leis v. Hodgson*, 1 Colo. 393, 394.

⁴⁷ *Leis v. Hodgson*, 1 Colo. 393; *Cincinnati etc. Ry. Co. v. Case*, 122 Ind. 31, 23 N. E. 797.

⁴⁸ *Freeman v. Illinois Cent. R. Co.*, 107 Tenn. 340, 64 S. W. 1.

⁴⁹ See post, § 381, and note.

⁵⁰ *Friedman v. Manley*, 21 Wash. 675, 59 Pac. 490. See, also, *McDougall v. Walling*, 21 Wash. 478, 75 Am. St. Rep. 849, 58 Pac. 669.

⁵¹ See post, §§ 752-774.

tion of jurisdiction, and going to the abatement of the proceedings. By failing to raise the point before plea to the merits, the defendant waives any rights he may have had to object.⁵² The law herein appears to have been clearly and fully stated by the court in *People v. Turner*,⁵³ as follows: "Errors and irregularities in the proceedings, resulting in the presentation of the indictment—when the party against whom the same is presented had not, prior to the submission of the charge contained therein to the grand jury, been held to answer—any legal ground of challenge to the panel, or to an individual grand juror, can only be made available to defendant before plea by motion to set aside the indictment. The action of the court upon the demurrer, and upon the motion to set aside the indictment, can only be reviewed in the appellate court on appeal from the final judgment. Objections which may be presented by demurrer before plea may further be made available after verdict by motion in arrest of judgment; and the action of the court on this motion can only be reviewed on appeal from the judgment. Thus, it will be seen, that a motion for a new trial presupposes sufficient legal evidence in support of its allegations, a legal verdict upon which a valid, binding judgment is pronounced. The statute does not contemplate or authorize a retrial upon an insufficient or invalid indictment; hence, a motion for a new trial cannot properly be based upon any objection to the sufficiency or validity of the indictment, or any errors or irregularities occurring in the proceedings before issue of fact joined by plea to a good and sufficient indictment, the object and purpose of a retrial being simply to enable the trial court to avoid the errors and irregularities claimed to have occurred on the former trial to the prejudice of the rights secured to the defendant." Nor is a motion for new trial the remedy to reach the defect of a failure of the proper prosecuting officer to sign an information. That defect can only

⁵² *People v. Bawden*, 90 Cal. 195, 27 Pac. 204; *Ex parte McConnell*, 83 Cal. 558, 23 Pac. 1119; *Ex parte Moon*, 65 Cal. 218, 3 Pac. 644; *State v. McCaffery*, 16 Mont. 33, 40 Pac. 63; *Gardner v. State*, 81 Ga. 144, 7 S. E. 144.

⁵³ 39 Cal. 370, 372. To same effect, *People v. Villarin*, 66 Cal. 223, 230, 5 Pac. 154, holding also that, after plea to the merits, all statutory objections to the information, or any defects apparent upon its face, are waived, except a want of jurisdiction, or the failure of the information to state facts constituting a public offense.

be reached by motion to set it aside before plea to the merits. And if not urged in some form at that stage it is deemed to be waived.⁵⁴

§ 12. New trial distinguished from venire de novo.

New trial should not be confounded with the ancient form, still sometimes employed in certain jurisdictions, of venire de novo, which lies for defects apparent on the face of the record. The use of the phrase "motion for a venire de novo," as applied to a special finding of the court, cannot be defended upon philological grounds, but the phrase is a convenient one, commendable on account of its brevity, its place not easily supplied, and its employment justified by general usage.⁵⁵ Where, for instance, a special verdict is so indefinite and uncertain, by reason of a failure to find material facts, that it will not support a judgment, a venire de novo should be granted on motion.⁵⁶ The California Code of Civil Procedure contains a provision remedial of the defect of an informal or irresponsible verdict. It provides that "when the verdict is announced, if it is informal or insufficient in not covering the issues submitted, it may be corrected by the jury under the advice of the court, or the jury

⁵⁴ *State v. Schnepel*, 23 Mont. 523, 528, 59 Pac. 927. In this case the court said: "The record does not show whether a motion to set aside the information was made in the trial court. Even if there had been, and the court had erred in refusing to set it aside for the reason that it was not properly subscribed, the error thus committed by the trial court could be reviewed only on appeal from the judgment. The question presented by this assignment is, therefore, not before this court on this appeal. If the court below granted defendant's motion for a new trial on this ground, it was error." To same effect, *State v. McCaffery*, 16 Mont. 33, 40 Pac. 63.

⁵⁵ See *Johnson v. Horsford*, 110 Ind. 572, 10 N. E. 407. The distinctions between new trial and venire de novo, and their respective offices are very clearly and learnedly pointed out by Lord Chief Justice Willis in *Witham v. Lewis*, 1 Willes Rep. 54, 55, by Judge Tucker in *Kinney v. Beverley*, 2 Hen. & M. (Va.) 318, and by Judge Carr in *Brown v. Ralston*, 4 Rand. (Va.) 518.

⁵⁶ *Cottrell v. Nixon*, 109 Ind. 378, 10 N. E. 122; *Kissler v. Citizens' St. Ry. Co.* (Ind. App.), 58 N. E. 891, contradictory verdict. A motion for a venire de novo will not be sustained, unless the verdict or finding is so defective on its face that no judgment can be rendered on it: *Bartley v. Phillips*, 114 Ind. 189, 16 N. E. 508.

may be again sent out.”⁵⁷ The Penal Code contains still more specific provisions.⁵⁸ Corresponding provisions are generally to be found. But there is another instance in which a venire de novo must have been awarded at common law, and would have necessitated a retrial even in the absence of any statutory ground for it. It is shown in an early Alabama case where the sheriff being unable to attend court on account of sickness, the panel of jurors was summoned by a person not qualified. It was held that the prisoner was not legally convicted, the verdict was set aside and venire de novo awarded.⁵⁹ There is probably no state in which this might not occur at the present day. It would not, however, necessitate a new trial unless, perhaps, in the event of the party moving and his counsel being entirely ignorant of all the facts after having exercised due diligence, owing to the doctrine of implied waiver, now generally recognized.

§ 13. Right to new trial not lost by motion for judgment non obstante.

From the respective definitions and purposes of new trial and judgment non obstante, there appears no reason why it should be incumbent upon a party to elect between them; in other words, why resort to the latter is a waiver of the former. And, in an Oregon case where a defendant filed a motion for a new trial and a motion for judgment non obstante verdicto at the same time, which latter motion was allowed by the court, and final judgment rendered for the defendant, which judgment was reversed on appeal, it was held that the motion for a new trial had not thereby been disposed of; that it was not waived, and the trial court might, in its discretion, allow such motion after the reversal of the judgment given, notwithstanding the verdict.⁶⁰ There is a notable absence of American authority as

⁵⁷ § 619.

⁵⁸ Cal. Pen. Code, §§ 1161, 1162.

⁵⁹ State v. Monk, 3 Ala. 415.

⁶⁰ Fisk v. Henarie, 15 Or. 89, 13 Pac. 760. In delivering the opinion in this case (p. 97), Strahan, J., said: “Upon the argument it was urged with much force that the defendant’s motion for judgment, notwithstanding the verdict, and for a new trial, were inconsistent with each other; that the former motion necessarily assumed and conceded that the verdict was right, but that

to the exact relation between these two remedies. The above is the only case in which their true relation appears to have been directly considered and passed upon. The reasoning employed by the court supports the same conclusion as between motions in arrest, and for judgment on the pleadings, and new trial, as between judgment non obstante and new trial.

§ 14. New trial an independent proceeding.

The true relation of the proceeding to other proceedings in the same action was thus explained by Chief Justice Sawyer in *Spanagel v. Dellinger*:⁶¹ "Under our system, from the entry of

the complaint was insufficient. No case precisely in point was cited to support this contention, but we were referred to certain principles of the common-law practice, which were claimed to apply by analogy. But I do not think the objection can be sustained. If the rule of the common-law were as contended for by counsel, it referred to a mere matter of form, and not of substance, which is entirely inapplicable to our system of practice under the code": In *Jewell v. Blandford*, 7 Dana, 472, the question arose as to whether a motion in arrest of judgment implied a waiver of a right to a new trial; and the court in passing upon it and deciding that there was no waiver, said: "If it be true that a motion in arrest is an implied waiver of a right to a new trial, should not a motion for a new trial equally operate as an implied admission that there is no cause for arresting the judgment? And considered as an original question, then, should there be any such implied admission in either case? We think not. Indeed, in England this is a mere matter of practice only, and arose in England, from the peculiar organization and powers of its courts. There is no principle in it. Our practice is different, and is, therefore, more consonant with justice, and all the ends of the law." To the same effect, though the point was not directly passed upon, are *Bartholomew v. Clark*, 1 Conn. 472; *Pope v. Latham*, 1 Ark. 66.

⁶¹ 38 Cal. 284. To same effect, *Carpentier v. Williamson*, 25 Cal. 167; *Fogarty v. Fogarty*, 129 Cal. 46, 61 Pac. 570; *Knowles v. Thompson*, 133 Cal. 245, 65 Pac. 468; *Freas v. Townsend*, 1 Colo. 86; *Outcalt v. Johnson*, 9 Colo. App. 519-524, 49 Pac. 1058. It appears that in Kentucky an appeal is a bar to a proceeding for a new trial, and vice versa, except where the ground upon which a new trial is sought is one of which the party could not avail himself on the appeal: See *Duncan v. Allender*, 23 Ky. Law Rep. 256, 62 S. W. 851. For rule in supreme court where errors relied on in both appeals, see post, chapter 40. In Utah the judgment is not final pending a motion for a new trial, in the sense which will permit an appeal to be taken from it: *Stoll v. Daly Min. Co.*, 19 Utah, 271, 57 Pac. 295.

the verdict or filing of the findings of the court, the motion for new trial is a kind of episode, or in a certain sense a collateral proceeding—a proceeding not in the direct line of the judgment; for the judgment may be at once entered, and even executed, while a motion for a new trial is pending in an independent line of proceeding, which ends in an order reviewable on an independent appeal. The motion may be heard and decided, and an appeal taken on its own independent record, while the proceedings on and subsequent to the judgment may be still regularly going on, and an independent appeal taken in that line.” The foregoing is only true in those states where the order on motion for new trial is an appealable order. At common law, and still in some of the states, the motion must be made and disposed of before the entry of judgment. Where that is the case the proceeding for new trial is like all other episodes of the trial, a part of it, and the order, if denied, may sometimes be urged as error, and sometimes not. In Oregon, and perhaps in one or two other states, an indirect method for review of the ruling on the motion and a direct method for review of all rulings involved in the motion has been pointed out by the supreme court;⁶² but no appeal can be taken from the order by either party, nor can it be even assigned for error. But the question of the dependence or independence of the proceeding has no essential connection with its true character or definition. It is an important matter for consideration, however, where its relation to parties not moving, and its effect upon other proceedings in the action, are involved. These matters are the subject of a separate chapter, where they are fully discussed.⁶³

§ 15. Effect of legislation on pending proceeding.

An act of legislation granting a new trial to a party, after the time had passed and the judgment had become final, would be clearly unconstitutional as would an act reopening a judgment in an action already litigated between parties, and the time passed for taking an appeal. In addition to the objection that it attempted to disturb vested rights there would lie against it the additional objection that it was an assumption by the legislative de-

⁶² See post, § 19, chapter 40.

⁶³ Chapter 18.

partment of judicial powers.⁶⁴ But it is well settled on authorities, so numerous that they need not be here cited, that the procedure, to govern prospectively may be amended, or abolished and a

⁶⁴ See *People v. Frisbie*, 26 Cal. 135. In *Kelly v. Larkin*, 47 Cal. 58, a question was disposed of, involving the right of a party to use, on a motion for new trial, a statement prepared under the provisions of the Practice Act, rather than a bill of exceptions, under the Code of Civil Procedure. The question there decided is of no present practical importance.

In *Spears v. Modoc County*, 101 Cal. 303, 304, 35 Pac. 369, the plaintiff had been convicted in a justice's court of violating an ordinance of Modoc county, and sentenced to pay a fine and to be imprisoned for the period of one day for each dollar of the fine until it was paid. He appealed to the superior court, where the judgment was affirmed. But before the hearing of the appeal the ordinance under which he was convicted was repealed. The sheriff was proceeding to sell the plaintiff's property under execution to pay the fine when the plaintiff brought an action to restrain the sale. A demurrer to the complaint in the action was sustained, and from the judgment entered thereon the plaintiff appealed. In reversing the judgment the court said: "By the appeal from the superior court the enforcement of the judgment appealed from was stayed until after the determination of the appeal. As no undertaking on appeal was required, the appeal itself operated as a supersedeas. The effect of the appeal was, therefore, to preserve the rights of the parties in the same condition as they were prior to the entry of the judgment; and until the determination of the appeal the proceeding was a pending action in which the rights of neither party had been conclusively determined. In *People v. Frisbie*, 26 Cal. 135, an appeal had been taken from a judgment for delinquent taxes, rendered in favor of plaintiff, and the judgment of the district court was affirmed. Pending the appeal, and before decision thereon the legislature passed an act authorizing an additional defense to be interposed by the defendant in pending suits, and it was held that the appeal had suspended the operation of the judgment so that the action was still pending, and that the plaintiff did not have a vested right to the judgment, but that its rights were limited to its cause of action: See, also, *People v. Treadwell*, 66 Cal. 400, 5 Pac. 686. . . . This principle has been applied more frequently to penal statutes, and it may be regarded as an established rule that the repeal of a penal statute without any saving clause has the effect to deprive the court in which any prosecution under the statute is pending of all power to proceed further in the matter." In *Kay v. Goodwin*, 6 Bing. 576, 4 Moore & P. 241, Chief Justice Tindal said that the effect of repealing a statute is "to obliterate it as completely from the records of the parliament as if it had never passed; and it must be considered as a

new method of procedure substituted.⁶⁵ And legislative changes in the procedure on motion for a new trial and changes in the manner of taking an appeal, apply to actions pending, where these steps in such actions have not already been taken as well as to actions commenced thereafter. But such changes do not govern the practice where the motion for a new trial has already been made, or where the appeal has already been taken.⁶⁶ For

law that never existed except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law." To same effect, Sedgwick on Statutory Construction, § 166. While the principle is of general application it has found most frequent application in cases imposing penalties, and criminal cases. In *State v. Railroad Co.*, 3 How. (U. S.) 552, Chief Justice Taney, in course of the opinion, said: "The repeal of the law imposing the penalty is of itself a remission." See, also, *Speckert v. City of Louisville*, 78 Ky. 287; *Tuton v. State*, 4 Tex. App. 472; *Munroe v. State*, 8 Tex. App. 343.

⁶⁵ See *People v. Frisbie*, 26 Cal. 135, 139.

⁶⁶ *Gassert v. Bogk*, 7 Mont. 585, 601, 19 Pac. 281. In this case exceptions to instructions given had not been properly taken. Thereafter, but before the consideration of the appeal, the legislature passed a law amending the Code of Civil Procedure which declared that instructions should be deemed excepted to without exceptions to the same being taken. It was held that under section 209, division 5, of the Compiled Statutes, the amendatory statute did not cure the defect in the taking of the exceptions to the instructions. In *People v. Mortimer*, 46 Cal. 114, the court said: "It is contended for the defense that under section 6 of the Penal Code, above quoted, it was the duty of the court to conduct the trial in all particulars as though the code had not been adopted. It is claimed in other words, that the forms of procedure provided in the code have no application in any particular to trials for offenses alleged to have been committed before the code took effect, and the argument is based upon that portion of section 6 which provides that any act or omission commenced prior to the taking effect of the code 'may be inquired of, prosecuted, and punished in the same manner as if this code had not been passed.' It is said the word 'may' in this sentence will be construed as 'must,' and that the terms 'inquired of' and 'prosecuted' . . . in the same manner as if this code had not been passed,' necessarily imply that the forms of procedure provided in the code were not intended to apply in any particular to that class of cases. But we will be aided somewhat in interpreting this clause, by section 4 of the Penal Code, which is in these words: 'The rule of the common law that penal statutes are to be strictly construed,

still stronger reasons is such legislation inapplicable to a case where a motion for a new trial has been heard and disposed of by the lower court before its enactment.⁶⁷

§ 16. Applicability of statutes to trials by referees.

In considering to what conclusions and reports by referees are included in the provisions governing new trials in the California Code of Civil Procedure, much will depend upon the nature and scope of the order of reference. The same code contains several provisions relating to references and referees which must be referred to in this connection, and considered together.⁶⁸ The provisions of the Practice Act of 1851,⁶⁹ prior to its amendment in 1865-66, were substantially different from those of the code, and as a consequence, numerous early decisions—a critical consideration of which is deemed unnecessary⁷⁰—were antiquated in consequence of amendments to the statutes on the subject and the amendments subsequently made and afterward incorporated in the code. In *Peabody v. Phelps*,⁷¹ a correct and discriminating construction of the then existing Practice Act on the subject is found, in an opinion by Justice Field, who

has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.' The particular purpose intended to be accomplished by section 6 was to steer clear of any difficulty arising from the enactment of *ex post facto* laws, which are prohibited by the constitution of the United States. But laws changing the mere forms of procedure in a criminal action are not within this category."

⁶⁷ *Poujade v. Ryan*, 21 Nev. 449, 33 Pac. 659. To same effect, *Hancock v. Thorn*, 46 Cal. 643; *Caulfield v. Doe*, 45 Cal. 222.

⁶⁸ See §§ 638-645, 670.

⁶⁹ See § 187.

⁷⁰ See for decisions inapplicable to present statutes, or subsequently criticised or overruled, on this subject, *Gunter v. Sanchez*, 1 Cal. 45; *Tyson v. Wells*, 2 Cal. 121; *Headly v. Reed*, 2 Cal. 322; *Russell v. Elliott*, 2 Cal. 245; *Porter v. Barling*, 2 Cal. 72; *Sloan v. Smith*, 3 Cal. 406.

⁷¹ 9 Cal. 213, 225. Cited and approved in *Allen v. Hill*, 16 Cal. 113, 118, as to the finality of verdicts and reports of referees, and holding that the time limited by the statute for notice of motion for new trial dates from the rendition of a special verdict, in analogy to the rule in case of report of referee, under general reference.

pointed out that the time within which a motion to set aside the report of a referee must be filed, and a statement prepared for that purpose depended upon the character of the reference, whether special to report facts, or general, to report upon the whole issue. He explained that in the former case the report had the effect of a special verdict, while in the latter it stood as the decision of the court, and judgment might be entered thereon, the decision excepted to, and proceeding for its review instituted, in like manner as if the action had been tried by the court.

In the later case of *Hihn v. Peck*,⁷² is found a very clear and concise exposition as to the finality of reports of referees, and the controlling effect of the order of appointment in determining whether the report shall be of facts, or of findings; that is to say, the order of appointment must be referred to to determine whether the report should be general or special. And in this respect the decision is in harmony with those rendered since the adoption of the codes. The court, per Shafter, J., said: "It is the duty of a referee to act upon the questions committed to him, and to report whatever he is required to report by the order under which he acts. The order in this case did not require the referee to report the facts, but to try the issues and report 'his findings thereon.' To that extent the order was general and not special The issues, narrowed as they were, undoubtedly involved matters of law as well as matters of facts, and the referee seems to have tried the issues in both elements or branches, and to have reported 'his findings thereon,' as required by the order. A jury sworn to try the issues in an action may return a general verdict, and a referee may under like circumstances act in like manner." It was held that the appellant had proceeded properly in moving for a new trial upon the filing of the report.

The amendments to the Practice Act made in 1865-66⁷³ are substantially reproduced in the Code of Civil Procedure, and

⁷² 30 Cal. 281, 286. As to right of clerk to enter judgment on such general report, see *Tarpening v. Halton*, 9 Colo. 312. Provisions of Practice Act on subject of referees held inapplicable with respect to finality in divorce cases: *Baker v. Baker*, 10 Cal. 527. See, also, *Harris v. San Francisco Sugar Ref. Co.*, 41 Cal. 393, 404-407; also, *Jones v. Clark*, 42 Cal. 196, holding that on reference to take an accounting it is not necessary to move for a new trial, in order to have some of the referee's findings changed.

⁷³ Laws 1865-66, p. 845.

were so construed as to remove the uncertainty which had previously existed, and had arisen from the failure of the original Practice Act to use the word "report" discriminately, and no doubt those who framed the amendments had before them the above-mentioned opinions pointing out that the term "report" might mean findings of fact in one case and something short of findings in another, depending upon the scope and terms of the order of reference. And yet in *Faulkner v. Hendy*,⁷⁴ we find this language: "In that section [referring to section 187 of the Practice Act] the word 'report' is evidently used for finding or decision." One or two decisions subsequent to the new procedure have been criticised, or rather shown to have been misleading, for the reason that the change was not noted.⁷⁵ The various kinds of reference are separately specified in the code.⁷⁶ The findings of a referee upon the whole issue must stand as the finding of the court, and judgment may be entered thereon.⁷⁷ This is the finding referred to in section 670, and constitutes a part of the judgment-roll.⁷⁸ The proceedings before a referee under such an order are quoad those of the court, and a bill of exceptions containing his rulings upon evidence, when settled, allowed and filed, constitutes part of the judgment-roll, and may be, when settled according to the provisions governing therein,⁷⁹ used on motion for new trial, with the same force and effect as if the trial were before the court.⁸⁰

The decision in *Cappe v. Brizzolara*,⁸¹ applying the provisions of the Practice Act to such a finding, is good authority under the code. In that case it was held that the provisions of the Practice Act relating to new trials vested in courts the same power in cases tried by referees, as in cases tried by the court itself, or

74 103 Cal. 15, 20, 26 Pac. 1021.

75 See *Thompson v. Patterson*, 54 Cal. 542, noticed in *Faulkner v. Hendy*, 103 Cal. 15, 20, 26 Pac. 1021.

76 See Cal. Code Civ. Proc., § 639.

77 See Cal. Code Civ. Proc., § 644.

78 See Cal. Code Civ. Proc., § 670, subd. 2.

79 See Cal. Code Civ. Proc., § 659.

80 See *Branger v. Chevalier*, 9 Cal. 353, 363.

81 19 Cal. 607. See, also, *Donahue v. Cromartie*, 21 Cal. 83, 87, where the "report" of the referee, consisting of findings of fact and conclusions of law was treated and given force and effect as if made by the court.

by a jury. Cope, J., delivering the opinion, said: "This is an appeal from an order setting aside the report of a referee and granting a new trial. The order was based upon the insufficiency of the evidence to justify the decision; and as there was some conflict of testimony, we do not see upon what principle we could properly interfere. There is no doubt that it is competent for the court to grant a new trial on that ground; and its legal discretion in that respect was not affected by the fact that the case was tried before a referee. The provisions of the Practice Act relating to new trials are general in their terms, and vest in the court the same power, in cases tried by a referee, as in cases tried by the court itself, or by a jury. Every case is placed upon the same footing; and the grounds upon which a new trial may be granted are the same in all cases, irrespective of the manner in which the case was originally tried."

[The effect of the proceeding for new trial and order therein on the status of parties and of other proceedings in the same action,⁸² the question of the interest or relation which will entitle a party to maintain the proceeding,⁸³ are reserved for consideration under more appropriate heads.

⁸² Post, §§ 417-422.

⁸³ Post, § 358 et seq.

CHAPTER 2.

JURISDICTION.

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- § 26. When jurisdiction lost by adjournment of term before deciding on motion.
- § 27. Jurisdiction of the proceeding lost by making final order on the motion.
- § 28. New trials in justices' courts.
- § 29. Numerous branches of law involved in exercise of jurisdiction.

§ 17. Early history of jurisdiction in obscurity.

Although historical discussion should be avoided as much as possible in works designed for practical use, yet, a brief review of the growth and development of the law governing new trials is necessary to a clear understanding of modern statutes and decisions.

The origin of new trials it appears to be impossible to trace. The first well-authenticated instance where a *venire de novo*, the name by which the proceeding was first known, was directed is found in the year books about 1410; and it issued in that instance for misconduct of the successful party in tampering with the jury.¹ After a long interval, during which scarcely a mention of the subject can be found, the practice of granting new trials became a frequent occurrence. The abstinence of courts during the interval was, curiously enough, not because of any

¹ 3 Blackstone's Commentaries, 268.

attempt to retain and exercise, arbitrarily, power, but a reluctance to set aside verdicts, lest such practice be alleged against them as an abuse of power. The first recorded instance of a new trial being granted in the courts is *Wood v. Gunston*, in 1553, the ground being that the damages were excessive.² But even years previously (1648), as was stated by Bacon, a judgment was arrested in *Slade's case*,³ tried in the common pleas upon a certificate of the judge that the verdict passed against his opinion. Until that time no stay of judgment had ever been attempted, or any venire de novo directed, except for matter appearing of record. This earlier case, however, appears to have been generally overlooked. Whenever in subsequent decisions the judges have seen fit to refer to the origin of new trials on the merits, they have referred to *Wood v. Gunston*. Upon the precedent established by this case the practice of granting new trials became common, the reluctance of the courts to interfere with verdicts lest they appear to be arbitrary giving way to a more liberal and enlightened policy. From that day to the present the courts in England and in this country have felt free to exercise their corrective powers over verdicts, thereby promoting the ends of justice. The right of jurisdiction has seldom been doubted, and the almost innumerable instances of its exercise, and the elucidation of principles governing the relief, and of the wholesome limitations upon the exercise of the power from time to time have served to develop this branch of the law into a well-defined system to which statutory enactments, defining the causes for which new trials may and may not be granted, and the procedure therein, have added much.

18. Exercise of the jurisdiction necessary to social existence.

In the nature of things it was impossible that the old idea, that the granting of a new trial was a usurpation of authority, not to be tolerated by society, should continue. A more wretched state of society can scarcely be conceived than that in which jurors may be corrupted and intimidated, witnesses suborned, exiled, secreted and driven beyond the jurisdiction, parties surprised and misled, and left to suffer without allevi-

² Style, 466.

³ Style, 133.

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ation the result of accident and misfortune without by any foresight or diligence have provided against perpetuated the rule that the rulings of courts and their testimony before juries as to what stand for all time against reason and ofttime authoritative precedent. It would have made students the hapless victims of ignorance and of error and judicial records would have been encyclopedias of contradiction. Lord Mansfield in *Bright v. Bright* explains the necessity for conceding power to the new trials: "Trials by jury in civil cases could without power somewhere to grant new trials. If judgment be given in point of law, there are means to set it right. Where a court judges of fact, in writing there are many ways to review and set right a verdict can only be set right by a new trial, which having the cause more deliberately considered when there is a reasonable doubt, or perhaps justice has not been done. The writ of attaint sound in every case; in many it does not preclude." (1) There are numberless causes of false verdicts: corruption or bad intention of the jurors. The too much of the matter before the trial, and without knowing it. The cause may be intricate and may be so long as to distract and confound the jury. (2) Most general verdicts include legal conclusions of fact: in drawing these conclusions the jury may mistake and infer directly contrary to what they may be surprised by a case falsely made at the trial. They had no reason to expect, and therefore could not answer. If unjust verdicts obtained under such circumstances were to be conclusive determinations of civil property in this method of trial, it is precarious and unsatisfactory. It is absolute justice that there should, upon many occasions, be reconsidering the cause by a new trial." Sir William Blackstone are expressed with his authority as follows: "If every verdict was final, it would tend to destroy this valuable

JURISDICTION.

and would drive away all causes or consequences to be according to the forms of the imperial law, upon deposition, which might be reviewed in a course of appeal. Of great importance, titles to land, and large questions of personal property, come often to be tried by a jury, merely on the general issue, where the facts are complicated and the evidence of great length and variety, and sometime of great difficulty, and where the nature of the dispute very frequently produces nice questions and subtleties of law. Either party is surprised by a piece of evidence, which (had he known of it) he could have explained or answered, or is puzzled by a legal doubt, which a little recollection would have solved. In the hurry of a trial, the ablest judge may be unable to state and arrange the evidence as to lay it clear before the jury, nor to take off the artful impressions which have been made on their minds by learned and experienced advocates. Jurors are to give their opinion instantaneously, that is before they have had time to separate, eat or drink, and, under these circumstances, the most intelligent and best intentioned men may bring in a verdict which they themselves, upon cold deliberation, would wistfully reverse." §

19. Extensive discretion at common law.

An extensive discussion of the jurisdiction at common law, having reference to its range and scope, would be of little use. The grounds upon which the relief could be administered were, however, while within this subjectively narrow jurisdiction courts claimed and had conceded to them a measure of discretion. While in many states grounds upon which new trials may be granted have been added to those known to the common law, limitations, restrictions and conditions have been generally imposed by statute, the nonobservance of which in material respect renders the proceeding ineffective. At common law the control over the subject of new trial conceded to the courts was so far unlimited that their power amounted to a mere absorption, or usurpation of the functions of the jury in many instances. At present, a corrective jurisdiction has been given to higher courts in most of the states, and newly discovered evidence, accident, surprise, unfore-

§ 3 Blackstone's Commentaries, 290.

fortune, are among the new grounds given by statute, and in the state, Minnesota, mistake is also made an additional ground for new trial; all of which will be more fully shown in proper relation hereinafter.

Numerous early decisions might be cited to show the arbitrary character of the power wielded by trial courts in the absence of statutory restraint, both in the granting and denying motions for new trial. Until a comparatively recent date there was no method recognized, nor had any been provided to review even an abuse of discretion herein, however flagrant such abuse might be. The discretion amounted to a review by the trial court upon the whole case and the ordering of a new trial either upon the law or the evidence, in view of circumstances within his knowledge or which might be called to his attention: he was not satisfied with the verdict, or of a refusal to disturb the verdict if he were satisfied with it. Prior to statutory regulations, no attempt had been made to fix any bounds to, or limitations upon, such discretion, except that in a few cases there were intimations by the higher courts that the discretion was similar to, and to the same extent limited, as that exercised in granting and refusing continuances and ruling upon motions to set aside defaults.

In *Brevard v. Graham*,⁶ the court remarked that it was difficult, if not impracticable, to lay down any precise rule upon the subject of new trials; that they depended much upon the nature of the controversy and the whole complexion of the cause. And in *White v. Trinity Church*:⁷ "A petition for a new trial is an application to the sound discretion of the court, and incapable of being reduced to the standard of fixed and certain rules." Therefore, an application for new trial was simply an appeal to the discretion of the court, in the exercise of which they were supreme, so long as they kept within the limits of their authority. But, of course, they were limited subjectively. It was not every matter intrusted to their jurisdiction of which they had cognizance in which there could be a retrial; and if they granted a new trial in a case where they had no legal authority to do so it was error.⁸ The Oregon system is that of the

⁶ 2 Bibb, 177.

⁷ 5 Conn. 187.

⁸ *Houghton v. Slack*, 10 Vt. 520, per Phelps, J.; *Henderson v. Moore*, 5 Cranch, 11.

informed trial judges will seldom exceed. And it is no more difficult at the present day to reduce this reasoning to order and system and to classify the most important of these precedents under the appropriate heads of that system than it would be in any other branch of jurisprudence.¹⁵

21. Of the actions and proceedings in which new trials may be had.

Bearing in mind the legal sense of the term "new trial," it is obvious that there can be none unless the case admit of the framing and trial of an issue of fact; but where that condition presents itself, there is no distinction between actions at law and in equity,¹⁶ or between actions and special proceedings. And before district and probate courts were superseded by superior courts combining the jurisdictions of both, a new trial might be granted by the district court of issues determined therein, which had been framed in a probate court, and probate courts were bound by the final determination of such issues in the district court.¹⁷ The jurisdiction to grant new trials in

¹⁵ The essential limitations upon the jurisdiction seem to have been in the minds of some of the judges from the earliest stages of its exercise. Thus, in the first case of which we have a fully authenticated record, the court, per Glynn, C. J., said: "It is in the discretion of the court, in some cases, to grant a new trial, but this must be a judicial and not an arbitrary discretion": *Wood v. Dunston*, Style, 466. And Buller, J., in *Estwick v. Culland*, 5 Term Rep. 425: "On an application for a new trial, the only question is, whether, under all the circumstances of the case, the verdict is or be not according to the justice of the case, for, though the judge may have made some little slip in his directions to the jury, yet if justice be done by the verdict, the court ought not to interfere and set it aside." And the same judge in *Cox v. Kitchen*, 1 Bos. & P. 339: The defense is dishonest and unconscientious and on that ground I think the court ought not to interpose." The discretion committed to a trial court to set aside a verdict and grant a new trial is not an arbitrary one, and does not exist, unless authorized by law or established precedent: *Sovereign Camp Woodmen v. Chebaud* (Kan.), 69 Pac. 348.

¹⁶ *Hall v. Linn*, 8 Colo. 264, 268, 5 Pac. 641; *People ex rel. Tucker v. District Court*, 14 Colo. 396, 399, 24 Pac. 260. The last case holds that in this respect it is immaterial whether the case were tried by the court, a jury or referees.

¹⁷ *Will of Bowen*, 34 Cal. 682. To same effect, *Estate of Tomlinson*, 35 Cal. 510.

probate proceedings is a matter of considerable importance. The subject was discussed at some length in *Estate of Franklin*,¹⁸ dismissing an appeal from an order settling an annual account. The motion to dismiss was based on the ground that the transcript had not been filed within the forty days allowed by rule of court. In response to the motion it was shown that a motion for new trial had been noticed in the lower court, upon the making of the order appealed from, and that a settlement of the statement on that motion was still pending in the lower court. This was held to constitute no answer to the motion, for the reason that a new trial in such case was not permissible. Exactly the same question was not involved in *Estate of Moore*,¹⁹ but the decision there was sub-

¹⁸ 133 Cal. 584, 65 Pac. 1081, following *Estate of Sanderson*, 74 Cal. 199, 15 Pac. 753. See, also, *Estate of Herteman*, 73 Cal. 545, 15 Pac. 121. The opinion in the above case of *Estate of Franklin* contains a learned review and comparison of the authorities by Justice McFarland, in the course of which he said: "In *Leach v. Pierce*, 93 Cal. 624, 29 Pac. 238, it was held that a motion for a new trial was proper, where the contest was over a petition for the sale of real property, of an estate, because, under the provisions of the code on that subject, as in the *Estate of Bauquier*, 88 Cal. 302, 26 Pac. 178, 532, there were issues of fact presented in the form of pleadings. But in another appeal in the same case, reported in the same volume (*Leach v. Pierce*, 93 Cal. 614, 29 Pac. 235), the decision being subsequent to that in *Estate of Bauquier*, 88 Cal. 302, 26 Pac. 178, 532, it was held that a motion for new trial was not allowable on a contest for family allowance. The court there said that 'it was evidently the intention of those who framed and adopted the provisions of the code relative to probate proceedings to curtail dilatory proceedings in the settlement of estates.' The court further said: 'It is not necessary, however, in this case to lay down a rule of universal application, and all we decide is, that in the matter before us proceedings for a new trial were not authorized. It is better, perhaps, to follow the suggestion of Mr. Justice Miller in *Davidson v. New Orleans*, 96 U. S. 354, to ascertain the intent and proper application of the provisions bearing upon the subject 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require.' " In *Estate of Bauquier*, 88 Cal. 302, 26 Pac. 178, 532, the court said that it would be impossible to enumerate the cases in which a motion for a new trial is appropriate in probate proceedings.

¹⁹ 72 Cal. 335, 13 Pac. 880. The decision was to the effect that in probate proceeding to settle accounts, parties not entitled as of

But in California the remedy of the defeated party is limited to an appeal from the judgment. The question was given full consideration in *Packard v. Craig*,²⁶ and the court, after commenting on an early case and the statutes providing for election contests,²⁷ said: "The court declares that the proceeding is a summary one, wholly statutory in its nature, and intended to be expeditious and not encumbered by the delays which would be occasioned by such proceedings as a new trial." New trial is a proper proceeding on the part of the losing party in an action under the statute for usurpation of franchises. And in such action, the fact that the action is against a city and that the proceedings for changing the boundaries of the city are involved therein, cannot alter the nature of the action, or affect the right to move for a new trial therein, upon any questions of fact involved in the case, or for errors of law which may have occurred at the trial.²⁸ And a new trial may be granted in courts of record after verdicts rendered upon trials of cases appealed from justices' courts.²⁹

It appears not to have been directly decided by the supreme court of California whether after a trial de novo provided for by the California statute regulating appeals from justices' courts, the court may grant a new trial, but the provisions governing new trials are clearly applicable to such cases. In *Cur-*

²⁶ 114 Cal. 95, 97, 45 Pac. 1033.

²⁷ *Dorsey v. Barry*, 24 Cal. 449; Code Civ. Proc., §§ 1111-1127. See, also, *Cosgrove v. Howland*, 24 Cal. 457; *Keller v. Chapman*, 34 Cal. 635, 640; *Lord v. Dunster*, 79 Cal. 477, 483, 21 Pac. 865, 14 Colo. 47, 23 Pac. 84; *Lloyd v. Sullivan*, 9 Mont. 577, 588, 24 Pac. 218.

²⁸ *People v. Oakland*, 123 Cal. 145, 55 Pac. 772. New trials have been frequently granted in actions under section 803, providing for actions against those who usurp public offices and franchises: See *People v. Sutter St. Ry. Co.*, 117 Cal. 604, 49 Pac. 736; *People v. Rodgers*, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668.

²⁹ *State v. District Court*, 23 Nev. 343, 47 Pac. 100. The statutory provisions on the subject in California are substantially identical with those in Nevada. New trials are freely granted after trials de novo in both states. In the same case above cited the court said: "Nothing is said in the statutes as to what the procedure in appealed cases shall be, except that the court may regulate it by rule, which, so far as we know, has never been done, except in some few points immaterial to this question, but the legislature must have expected those courts to pursue the course they generally do pursue, and that is to try such cases in substantially

A motion for a new trial is not a proper proceeding, on an application for disbarment of an attorney.³¹

Jurisdiction to grant new trials in condemnation proceedings is given by section 1257 of the Code of Civil Procedure of California, which contains certain restrictions and limitations upon the right which should be consulted.

§ 22. Curtailment of discretionary power an incident of statutory procedure and of right of review on appeal.

It is impossible to consider the scope of, and limitations upon, jurisdiction of trial courts apart from the jurisdiction of higher courts to review their decisions, a subject fully discussed elsewhere.³² But it is important to consider in this place the sources of the jurisdiction before proceeding to the illustrations and expositions thereof in succeeding chapters. And since the jurisdiction is, under the statutory regime, statutory, the first source of information to which inquiry is directed in any given state is the statutory grounds for the motion. It is the main purpose of such statutes to point out how and upon what conditions the jurisdiction shall be exercised, and though it may be conceded that the jurisdiction of the courts to grant new trials pertains to their common-law powers, yet the power of the legislature to provide procedure for making the remedy effective and to prescribe reasonable conditions and limitations binding upon litigants invoking the remedy cannot be doubted. And such statutes may undoubtedly take away some of the grounds for new trial formerly recognized, or add new grounds, not existing at common law. Especially might the legislature limit the grounds for the motion if a ground originally existing were made a ground for a different character of proceeding for relief, for instance, the ground for a motion in arrest of judgment or to set aside the judgment. It is not neces-

³¹ *Matter of Tyler*, 71 Cal. 353, 12 Pac. 289, 13 Pac. 185. A city council, acting judicially, having once considered and adjudicated a matter appealed to it, cannot set its order aside or grant a retrial or rehearing: *Belser v. Hoffschneider*, 104 Cal. 455, 461, 38 Pac. 312; see *People v. Supervisors*, 35 Barb. 408.

³² See post, chapter 23. Appellate jurisdiction herein is of no importance where, as in Rhode Island, the proceeding is instituted by petition to the appellate court, very much as actions are instituted: See *Timony v. Casey*, 20 R. I. 257, 38 Atl. 370.

sary, however, to pursue this last proposition, since no instance is known in which any common-law ground has been excluded; the tendency has been rather to invent and add new grounds.

While the discretionary power of trial courts is necessarily curtailed by the institution of definite forms and rules for instituting, prosecuting and consummating proceedings for new trial, and by provisions for review of orders therein on appeal, yet a large share of the extensive former discretion still abides in trial courts, even in those states where the above features of legislation are found. The extent of this discretion depends somewhat upon the particular ground for new trial brought to the attention of the appellate court. In a few of the states, as will be hereinafter seen, no method of review of orders on the motion is provided, by appeal or otherwise; and where that condition is found there is, of course, no diminution of, or limitation upon, the discretion of the trial court.

§ 23. Of the grounds for new trial prescribed by statute.

The ground for new trial prescribed by statute may be designated as the subject matter of jurisdiction in each particular instance of a resort to the proceeding. The grounds for new trial specified in the states and territories named in the note below are typical of all. Where the statute fails to specify any ground, it is understood that all common-law grounds are available.³³ In California there is a separate section conferring general power upon the court to order a new trial of its own motion, and without an application from either party,

³³ California—1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial; 2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proven by the affidavit of any one of the jurors; 3. Accident or surprise, which ordinary prudence could not have guarded against; 4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial; 5. Excessive damages appearing to have been given under the influence of passion or prejudice; 6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law; 7. Error in law, occurring at the trial and excepted

upon certain considerations. Similar provisions are found in one or two other states. These are given consideration in a separate chapter.⁸⁴

There are many peculiarities in the statutory provisions specifying grounds for new trial in criminal cases, in the various states. The grounds available in various states are set forth in the notes.⁸⁵

to by the party making the application: Code Civ. Proc., § 657. Arizona Territory—No grounds are specified. "New trials may be granted, and judgments may be set aside or ousted on motion for good cause, on such terms and conditions as the court shall direct": Arizona Rev. Stats., § 1472. Idaho—Same as California: Idaho Code Civ. Proc., § 3524. Montana—Same as California: Mont. Code Civ. Proc., § 1171. Nevada—Same as California, except that the second subdivision omits all after the words "Misconduct of the jury": Nev. Comp. Laws, § 3293. Oregon—Same as California, except that the second subdivision reads thus: "Misconduct of the jury or prevailing party": Ballinger's Code of Oregon, 174. Utah—Same as California: Utah Code Civ. Proc., § 3292. Washington—The first, third, fourth and fifth subdivisions are the same as California; the seventh and eighth are the same, respectively, as are the sixth and seventh of the California sections; the second subdivision of the Washington statute reads as follows: "Misconduct of the prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict, to a finding on any question or questions submitted to the jury by the court other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors." The sixth subdivision (not found in any of the other states or territories here mentioned) reads thus: "6. Error in the assessment of the amount of recovery, whether too large or too small, when the action is upon a contract, or for the injury or destruction of property": Ballinger's Annotated Codes and Statutes of Washington, § 5071. Washington has another provision, also peculiar to it, reading as follows: "A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained": Ballinger's Annotated Codes and Statutes of Washington, § 5073.

⁸⁴ Post, § 413, et seq.

⁸⁵ The grounds for new trial set forth are found in the California Penal Code (section 1181) as follows: "When a verdict has been rendered against the defendant, the court may, upon his application, grant a new trial, in the following cases only: 1. When the trial has been had in his absence, if the indictment is for felony; 2.

rant new trials on grounds not mentioned, the authorities are conflicting. One line of decisions insist upon and uphold the common-law power to grant new trials "in promoting

tiring, may have become so intoxicated as to render it probable a verdict was influenced thereby. But the mere drinking of liquor by a juror shall not be sufficient ground for granting a new trial; 11. When, from any misconduct of the jury, the court is of opinion that the defendant has not received a fair and impartial trial; 12. When the verdict is contrary to law or evidence; 13. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When the motion for a new trial is made, upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to produce such affidavits, the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable; 14. Where any other cause exists other than those in this section enumerated, it shall be competent in all cases to prove any misconduct of the jury by the voluntary affidavit of a juror, and a verdict may in like manner in such cases be sustained by such affidavit."

The provisions in the Idaho Penal Code are the same as those in California: Idaho Penal Code, § 5522.

In Montana the provisions are the same as in California, except as follows: To subdivision 2 is added the words, "or any communication, document, or paper referring to the case." To subdivision 11 are added the words, "which may be shown as provided in the Code of Civil Procedure," said code permitting of the use of affidavits, as is provided by California Code of Civil Procedure. The provision in Nevada (Comp. Laws, § 4393), reads as follows: "The court in which a trial is had upon the issue of fact has power to grant a new trial where a verdict has been rendered against the defendant upon his application, in the following cases only: 1. When the trial has been had in his absence, if the indictment be for felony; 2. When the jury has received any evidence out of court other than that resulting from a view, as provided in section 377; 3. When the jury has separated without leave of the court, after retiring to deliberate upon their verdict, or been guilty of any misconduct tending to prevent a fair and due consideration of the case; 4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors; 5. When the court has misdirected the jury in a matter of law; 6. When the verdict is contrary to law or evidence. But no more than two trials shall be granted for this cause alone."

In Oregon the following provision is found: Bellinger's Annotated Codes and Statutes of Oregon, section 1425, provides as fol-

"A motion for a new trial is a statutory remedy, and can only be invoked in the manner, within the time, and upon the grounds provided for in the statutes. . . . Even if the notice had been in time and sufficient in substance, the affidavit contained none of the grounds enumerated in section 1171, of which alone the court could take notice. The fact that the referee had left the state without obeying the order made on December 2, 1897, though it resulted in inconvenience or even injustice to defendant, was not ground for a new trial." In the same state, however, it seems to have been held that a sort of combination or conglomeration of error, misconduct and carelessness appearing in a record would warrant an order directing a new trial, whether there appeared any particular ground for it or not.³⁹ Where such is the case, however, it is almost unavoidable that one or more of the statutory grounds be found to exist at the conclusion of the trial—insufficiency of evidence, errors in admitting evidence, etc.

declared that the grounds for new trial are statutory, and cannot be extended by the courts by rule. Section 632 of the Code of Civil Procedure, requiring the judge of the trial court to file his decision with the clerk within thirty days after the submission of the cause, is directory merely, and his failure so to do is not ground for a new trial: *McLennan v. Bank of California*, 87 Cal. 569, 25 Pac. 760. Within the boundaries of the jurisdiction conferred by statutes the object is to limit and curtail the power of the court.

Statutes limiting the number of new trials which may be granted to a party in the same action are uniformly construed strictly. And a statute prohibiting the setting aside of a third verdict on the facts was held not to apply where one of the prior verdicts was set aside on the ground of surprise in the introduction of evidence: *Louisville etc. R. Co. v. Blair*, 104 Tenn. 212, 55 S. W. 154.

³⁹ See *State v. Shafer*, 22 Mont. 17, 55 Pac. 526. To same effect, *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 562, 54 N. E. 987. An excellent illustration of the strictness with which statutes conferring the jurisdiction to grant new trials are construed is afforded by the decision in *O'Grady v. Supple*, 148 Mass. 522, 20 N. E. 114. A Massachusetts statute (Mass. Pub. Stats., c. 153, § 6) provides that in a civil action the court may set aside the verdict, and order a new trial for any cause for which a new trial may by law be granted. By another provision (chapter 167, section 70) in cases tried by the court without a jury, either party may move for a new trial for mistake of law, or for newly discovered evidence, and is entitled to review in the same manner as on trial by jury. Under these provisions it was held that in an action tried without a jury

The theory upon which the rule is based in the English courts was, that during the term the record was in the breast or knowledge of the judges, and not in the roll, and it was not until the term closed that the record was made up and completed, after which it could not be disturbed. In California and one or two other states, the constitutions and codes have abolished terms of court; and where that has occurred, the rules which formerly prevailed on this subject are of but little importance. In other states provisions are usually found for saving the rights of parties beyond the term.⁴⁴ In Colorado a section of the code,⁴⁵ which requires a motion for new trial, and the decision thereon to be made and had at the same term the findings are made or verdict rendered, was held to be directory merely, so far as the action of the court is required to be performed, within a special time.⁴⁶ Later it was held that where a trial is had to the court, and its findings announced, an undetermined motion for a new trial operates to reserve the case, and continue the jurisdiction beyond the term for the purpose of disposing of the motion and settling a bill of exceptions.⁴⁷ And in Oregon, it was held that where notice of appeal was served and filed, the bond was given, and an order extending beyond the term and time for presenting a bill of exceptions

255; *Suydam v. Pitcher*, 4 Cal. 280; *Branger v. Chevalier*, 9 Cal. 172; *Swain v. Naglee*, 19 Cal. 127; *Lewis v. Rigney*, 21 Cal. 273; *Dean v. Munhall*, 11 Pa. Sup. Ct. 69.

⁴⁴ As to whether statutes requiring motions for new trial to be made at the term at which trial was had go to the jurisdiction, or whether lapse of time may be waived, see *Larson v. Ross*, 56 Minn. 74, 57 N. W. 323; *Thomas v. Morris*, 8 Utah, 284, 31 Pac. 446; *Evansville etc. R. R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; *Lee Silver Min. Co. v. Englebach*, 18 Colo. 106, 31 Pac. 771; *Missouri Glass Co. v. Bailey*, 51 Kan. 192, 32 Pac. 894; *Convill v. Railway Co.*, 85 Tex. 96, 19 S. W. 1017; *Burgit v. Case*, 84 Iowa, 33, 50 N. W. 218; *Ruhrwein v. Gebhart*, 90 Ky. 147, 13 S. W. 447.

⁴⁵ *Mills' Annotated Code*, § 218.

⁴⁶ *Gomer v. Chaffee*, 5 Colo. 383, 385.

⁴⁷ *Stocking v. Morey*, 14 Colo. 317-320, 23 Pac. 343. See, also, *Filley v. Cody*, 4 Colo. 109, 111; *Kansas Pac. R. Co. v. Twombly's Adm.*, 2 Colo. 559, 561. A stipulation that a motion for a new trial be heard that a judgment be rendered in vacation would not, under the former practice, give jurisdiction; *Kirtley v. Marshall Silver Min. Co.*, 4 Colo. 111, 112; *Francis v. Wells*, 4 Colo. 275.

was made before adjournment of the term, such order operated to retain jurisdiction in the trial court, so that a subsequent order made after the term granting a new trial was not appealable on the ground that it was void.⁴⁸

An order passed in term, setting the hearing of a motion for new trial in vacation, in effect keeps the term, relative to that particular case, open until such motion shall have been decided.⁴⁹ And where after the making of such order the county was placed in a newly created district, it was held the new judge had jurisdiction to grant a new trial.⁵⁰

§ 27. Jurisdiction of the proceeding lost by making final order on the motion.

In consonance with the settled judicial view in most of the states of the nature of the proceeding for new trial, giving it a status distinct and separate from the main case, and holding that it may be prosecuted to a finality, without regard to whether an appeal has been taken from the judgment, and without reference to the disposition of such appeal, an order disposing of an application for a new trial is the end of the proceeding and terminates the court's jurisdiction thereof.⁵¹ But where,

⁴⁸ *Henrichsen v. Smith*, 29 Or. 475, 42 Pac. 486, 44 Pac. 496.

⁴⁹ *Herz v. Frank*, 104 Ga. 638, 30 S. E. 797.

⁵⁰ *Manufacturers' Mut. Fire Ins. Co. v. Daboll*, 79 Mich. 241, 44 N. W. 604.

⁵¹ *Dorland v. Cunningham*, 66 Cal. 484, 6 Pac. 135; *Coombs v. Hubbard*, 43 Cal. 451; *Lang v. Superior Court*, 71 Cal. 491, 12 Pac. 396; *Mitchell v. Hackett*, 14 Cal. 661; *People v. Center*, 61 Cal. 191; *Carpenter v. Superior Court*, 75 Cal. 596, 19 Pac. 174; *Klink v. People*, 16 Colo. 467, 27 Pac. 1062; *Crosby v. North Bonanza Silver Min. Co.*, 23 Nev. 70, 42 Pac. 583; *Burnham v. Spokane Mercantile Co.*, 18 Wash. 207, 51 Pac. 363; *State v. Lockhart*, 18 Wash. 535, 52 Pac. 315; *Kingman v. Chubb*, 8 Kan. App. 167, 65 Pac. 474. In *Burnham v. Mercantile Co.*, *supra*, the court emphasized the fact that the motion was reviewed upon the same grounds as in the former motion. After appeal from an order denying a new trial, the subject matter of that order is removed from the jurisdiction of the superior court, and, while such appeal is pending, it has no jurisdiction to change such order: *People v. Mayne*, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654. The Wisconsin statute allows court to grant a new trial at any time within one year after trial, although a motion has been already made and denied: *Wis. Rev. Stats.*, § 4719; *State v. Circuit Court*, 71 Wis. 595, 38 N. W. 192.

after a verdict in favor of plaintiff, the defendant had filed a motion for a new trial, which was overruled, and subsequently the supreme court decided a similar question adversely to the view taken by the court in overruling the defendant's motion, it was held that the latter court properly reversed its decision and granted a new trial.⁵² It is difficult to see in this case any substantial ground for the relaxation of the rule or how the decision of the supreme court could confer a jurisdiction not previously possessed.

§ 28. New trials in justices' courts.

In several states are found statutes providing for new trials in justices' court. These present nothing peculiar or exceptional. The same principles govern the extent and exercise of the jurisdiction, as govern courts of record. Thus, it was held under a statute allowing a justice of the peace to grant a new trial, within a limited number of days, that he could not grant it after the period, although the application was filed in time.⁵³

§ 29. Numerous branches of law involved in exercise of the jurisdiction.

The mental and moral functions exercised by courts pertaining to new trials are almost as extensive and varied as is the whole domain of law and equity. Not infrequently several grounds are ruled upon in one proceeding, or several specifications of the same general ground. If, for instance, irregularity be alleged, the sufficiency and admissibility of affidavits, the definition of irregularity, the character of the particular irregularity brought to its attention, and the presumption, if any, which attaches to it, are among the legal questions to be decided. If no legal presumption attaches to it, the court must then resort to equitable as well as legal considerations to determine whether upon the whole case a substantial right has been infringed; in other words, whether, notwithstanding the irregularity, substantial justice has been done between the parties. If the ground be accident or surprise or newly discovered evidence, many similar subjects must be passed upon. The subjects of

⁵² *Snow v. Vandever*, 33 Neb. 735, 51 N. W. 127.

⁵³ *Carter v. Commissioners of Van Zandt County*, 75 Tex. 236, 12 S. W. 985.

CHAPTER 3.

**IRREGULARITY IN THE PROCEEDINGS OF THE COURT, JURY,
OR ADVERSE PARTY, OR ANY ORDER OF THE COURT,
OR ABUSE OF DISCRETION, BY WHICH EITHER PARTY
WAS PREVENTED FROM HAVING A FAIR TRIAL.**

§ 30. Separations of qualifying phrases, without differences of meaning.

§ 31. Subdivisions of subdivision 1.

§ 30. Separations of qualifying phrases without differences in meaning.

It is apparent upon inspection of the above extract from section 657 of the California Code of Civil Procedure, the same being generally found in the same form, literally or substantially, that several grounds for new trial are therein jumbled together, which have no essential or even natural or logical connection. It is true that the subdivision closes with the clause, "by which either party was prevented from having a fair trial," not found at the close of, or in connection with any other subdivision, but only a study of the entire subject of new trials, and of the principles governing the proceeding, and of the decisions therein, is required, to convince the student that this clause is a useless superaddition to the qualifying clause which closes the opening paragraph of the section, namely, "materially affecting the substantial rights of such party." No court has ever attempted to distinguish between an act, episode or omission which affected a substantial right, and one which prevented a fair trial. If any one of the grounds mentioned in subdivision 1, for instance, should occur, and its occurrence prevent a fair trial, a substantial right of the party thereby prevented from having a fair trial would be affected. The converse is an equally sound proposition. The occurrence or existence of any ground mentioned in that or any other subdivision, prejudicially affecting a substantial right of a party—

CHAPTER 4.

IRREGULARITIES IN THE PROCEEDINGS OF THE COURT.

- § 32. Includes misconduct of court.
- § 33. Irregularity in general.
- § 34. Irregularity and error compared.
- § 35. Classification of irregularities according to legal effect.
- § 36. The doctrine of presumed injury or prejudice.
- § 37. Same subject—Amendment of 1897, to section 475 of the California Code of Civil Procedure.
- § 38. With reference to the time and place of holding courts.
- § 39. With reference to the disqualification of judges.
- § 40. With reference to the order of trial.
- § 41. Order of arguments.
- § 42. Irregularities in administering oaths and omitting oaths.
- § 43. Irregularity in judge absenting himself during trial.
- § 44. Irregularity in complying with request of jury for further instructions, or irregularly advising jury.
- § 45. Irregularity in failing to send out all or part of instructions or other papers with jury.
- § 46. Misconduct of judge in persuading jury to agree.
- § 47. Lecturing jury.
- § 48. Misconduct of court in animadverting upon conduct of counsel.
- § 49. Misconduct of court in commenting upon testimony and witnesses during trial.
- § 50. Controlling examination of witnesses and limiting cross-examination.
- § 51. Misconduct consisting of improper demeanor of court toward witnesses.
- § 52. Submitting wrong cause of action to jury.
- § 53. Irregularity in mode of trial.
- § 54. Refusal of court to compel election between counts.
- § 55. Irregularity pertaining to right of accused in criminal case to be present, etc.
- § 56. Irregularity in failing to advise defendant of his rights.
- § 57. Irregularity in process of impaneling jury.
- § 58. Irregularity in failure to admonish jury.
- § 59. Permitting jury to separate.
- § 60. Inability of court reporter to transcribe testimony.
- § 61. Misconduct of others than court and parties.
- § 62. As to duty of party to object or call irregularity to the attention of the court.

33. Irregularity in general.

The classification in the same subdivision of the subject of irregularities of the court, those of the adverse party serves no purpose of convenience. In a general sense, however, attorneys, as well as juries, are part and parcel of the court, in the trial of causes, and it is to the trial. The statutory order will be

§ 34. Irregularity and error compared.

The necessity of distinguishing, as far as possible, between irregularity and error, and of stating the irregularity in legal effect, at some point in the treatise will be undertaken here, and in treating of the various irregularities, in succeeding chapters, the matter will be made available by reference.

Among the differences which exist between "errors in law" warranting the granting of a new trial, and irregularities which may be relied upon for a new trial, is that which relates to the period in which they may occur. Errors, except those inherent in the making of orders constituting a separate ground in order to justify the relief, must have occurred during the progress of the trial, whereas, in the case of irregularities, no limitation of time prior to the termination of the trial is fixed by the statutes. Of course, irregularities occurring after the trial would not avail the party seeking a new trial, because it cannot be conceived how they could have prevented a fair trial; and a new trial cannot be granted for irregularities, unless it be made to appear that they might at least have had that effect.

No attempt has ever been, or will now, be made to enumerate all the irregular acts and occurrences between the joinder of issue and the decision which may so affect the result as to justify the court in granting a new trial. But the important place occupied by it among the grounds requires that irregularity be discussed at considerable length and illustrated by numerous adjudicated cases. The Code of Civil Procedure of California¹ reads in part as follows: "The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: 1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial."

Much less difficulty is encountered in pointing out what constitutes an irregularity than in pointing out what character and degree of irregularity, and the circumstances in which a given irregularity should be held to have so far vitiated the decision as to warrant its being set aside. The statute lays down a rule which is of but little use as a guide to the courts. To say that the irregularity must be such that the party was prevented from having a fair trial is equivalent to saying it must first appear that the party did not have a fair trial, and secondly that his failure to have fair trial was attributable to the irregularity. Now there may be occurrences pending a trial, the combined effect of which on the mind of the court

¹ § 957.

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or jury it would be difficult even for those present participating to know, and the statement of a fixed and alterable rule on the subject is out of the question. If the judge is dissatisfied with the decision, upon reflection, whether reached by himself or by a jury, and it be made to appear to him that there has been a flagrant or palpable departure from established laws of procedure, amounting to irregularity or misconduct, in any respect, he may grant a new trial on that ground; and in such case the appellate court will seldom interfere, unless it affirmatively appears from the record that no prejudice resulted from the irregularity.

§ 35. Classification of irregularities, according to legal effect.

It is impossible to classify irregularities by name, owing to the great variety of them which may occur. The following degrees may be specified, however, with an approximation of accuracy, having reference to their legal import and effect: 1. Fatal, necessitating a new trial; 2. Serious, presumptively judicial, but capable of being explained away, and shown to have been without injury; 3. Harmless, or, as sometimes termed immaterial, or unimportant, or slight.²

§ 36. The doctrine of presumed injury, or prejudice.

It is well established, theoretically at least, that the irregularity being shown injury from it is presumed, unless the contrary affirmatively appears. And yet trial courts observe a different practice, when an irregularity is established, and there is no positive showing as to what, if any, effect it has had upon the result of the trial, of reviewing the whole case, and, if upon review, it is satisfied that substantial justice has been done between the parties, or that there is no probability that upon retrial a different result would be reached, of denying the motion. And appellate courts have been of late more and more inclined to concede this power to trial courts, and of refusing to review notwithstanding a clear record showing of irregularity. Stated more fully and clearly, the rule of presumed injury is in substance that it was sufficient for the party moving for a new trial to show an irregularity in a record which failed

² See post, § 689.

³ The soundness of the above proposition is so well understood that a comparison of authorities is not required.

show whether or not a fair trial was prevented. Thereby the burden shifted to the successful party to show that the result would have been the same notwithstanding the irregularity. But even within this rule, not every irregularity which could be shown gave rise to the presumption of injury. The irregularity must have possessed, potentially at least, the element of evil. It must have been an irregularity of such character that it might have prevented a fair trial. The principle of presumptive injury, which is by no means universally recognized, has been explained, qualified and limited in many of the cases in which it was recognized and given effect. In California it was first positively declared in *People v. Backus*.⁴

In the subsequent case of *People v. Brannigan*,⁵ Chief Justice Field thus stated the rule as applied to irregularities in the conduct of jurors: "It would seem but reasonable where an irregularity has been committed which may have affected the jury, that the government seeking to uphold their action should be called upon to show that no injury to the prisoner has followed from the irregularity complained of. If this can be shown, their verdict will not be disturbed, for the end which the law contemplated by its provisions has been attained. The district attorney appears to have considered it incumbent upon the prisoner to show, affirmatively, injury to himself resulting from the separation, or at least reason to suspect such injury. There are authorities which support this view. Such are the cases cited from the New York courts. But there are authorities of equal weight the other way, and the latter we think are supported by better reasons."

The foregoing cases both relate to irregularities of jurors in criminal cases, but the principles hold good when applied to civil actions and to other irregularities.

§ 37. Same subject—Amendment of 1897 to section 475, California Code of Civil Procedure.

Section 475 of the Code of Civil Procedure of California, as amended in 1897, reads as follows: "The court must in every

⁴ 5 Cal. 275.

⁵ 21 Cal. 339. The subject is fully considered and additional authorities cited, post, §§ 148, 689.

stage of an action disregard any error, improper rulings, or defect, in the pleadings or proceedings which, upon appeal to said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or set aside by reason of any error, ruling or instruction or defect, unless it shall appear from the record that such error, ruling, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that a new trial is required, if error is shown." Prior to this amendment, section 475 read thus: "475. The court must, in every stage of the trial, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties. No judgment shall be reversed or affected by reason of any error or defect." Similiar provisions are found in the Penal Code, but they were not amended, nor has any rule been changed with reference to errors in criminal procedure. Indeed, the amendment of section 475 has made any change in the scope of inquiry of duties of courts sitting in civil cases.

The reasoning of the court in *San Jose Ranch v. San Jose etc. Co.*⁷ is as applicable to any ground for new trial mentioned in the first, second, third and fourth subdivisions of section 475 as the error there under consideration, error being the ground for new trial mentioned in the seventh. Justice Temple, in the opinion, said: "The 'substantial injury,' and 'substantial result' mentioned in section 475, must have reference to the final judgment. Ordinarily, we cannot ascertain or determine from the record whether the appellant has suffered substantial injury or whether a different final result would have been reached if not some particular error been committed. If the court has erroneously refused to receive any evidence for a party, it should arbitrarily determine all issues against him. It could not determine from the record whether he would have fared better if the evidence had been admitted. §

* Cal. Pen. Code, §§ 1258, 1404.

† 126 Cal. 324, 327, 58 Pac. 824.

ordinary action at law, a court were to erroneously deny a jury trial, the record could not disclose that a different result would have been probable if the error had not been committed, although it would plainly enough show that a party had been denied a trial according to the law of the land. A person against whom such a ruling has been made, and who has lost his case, has been deprived of life, liberty, or property without due process of law. And this amendment, if valid, would prevent a reversal of the cause upon that ground. That it might result in preventing the appellate courts from enforcing the fundamental right to a jury trial is not really of greater moment, perhaps not so much, as the fact that it may prevent this court from enforcing uniformity in the administration of the law. Under this rule any and all trial courts may refuse to be governed by the law of procedure and evidence, solemnly enacted by the legislature, and unless we can determine from the record, both that the different result would have been probable if the law of procedure had been followed, there could be no reversal."

A question for argument might arise as to whether the provisions of section 475 as thus amended should apply to cases of irregularity, when such question comes up for review upon motion for new trial, or on appeal from an order made on motion for new trial. Such an issue should be easily disposed of. In the first place, section 475 was before, and is since, the said amendment intended for the guidance of courts of review at all stages, as well as for trial courts at all stages, and is, both by its general terms, and by the policy underlying it, applicable to all stages of litigation and to all irregularities, which are nothing more nor less than "defects" in the proceedings. In the second place, even if it were conceded that irregularities were not in the contemplation of the legislature in the enactment of any of the legislation embraced in section 475, still irregularities would be subject to the same rules for the purpose of review as are errors, because the limitations in section 657 upon the granting of new trials are substantially the same as those upon reversal, etc., in section 475. And since the same rule as to presumption and rebuttal of injury must govern on review of irregularities and errors, much confusion, as well as many tedious repetitions, refinements and distinctions are avoided. The value of irregularity as ground for the motion for new trial can only be determined from

point which must be taken by the court sitting in review order; hence the justification for thus far anticipating on of that comprehensive subject.⁸

With reference to the time and place of holding court. Irregularities may frequently arise from a want of due observance of statutes regulating the time of holding court. Several decisions in California on this subject have become of importance since the adoption of the constitution of 1879; terms of court. Where terms of court are a feature of a jury system, most proceedings in vacation which pertain to cases such as are void, for want of jurisdiction, in which there are more summary and expeditious remedies than by a new trial. It was held in one case not to be within the power of parties to confer jurisdiction to try a case and enter therein by written consent.⁹ In the absence of any controlling findings to be filed and judgment entered in this case is authoritative. But even at that time, the Practice Act required express findings of fact and them to be filed and judgment to be entered thereon, in which case the filing of findings constituted the judgment. Upon a judgment-roll made up under the statute, there was no discernible excess of jurisdiction in such a case. But a bill of exceptions or statement there would be no lack of a judgment so entered. It was held that the absence of a trial did not render void a decision and judgment which were otherwise regular.¹⁰ For these reasons it

see, §§ 684, 689.

v. Gage, 40 Cal. 183.

People v. Bennett, 44 Cal. 87. Following this authority, it was the same effect in *Johnson v. San Francisco Sav. Union*, 75 Cal. 1. St. Rep. 131, 16 Pac. 753; *Ray v. Horsley*, 6 Or. 382, 388, p. 537, and note. In the last of these cases the court said: "The theory upon which the appellant can claim a reversal of judgment is, that it was rendered without jurisdiction and is void. The appellant waived all objections to the form of the trial or to the taking of the evidence, either by his expressed assent in open court or by not making his objection at the proper time. Parties litigate upon the decisions of the courts by passing over their objections and taking their chances upon a judgment in their favor. Thereafter, if the judgment shall be adverse to them, they may raise objections. The commencement of the trial in this case in fact was a trial, Vol. I—5

would seem that such an irregularity could be reached by motion for new trial, as the most appropriate and expeditious remedy. The same rule would apply as to acts done on nonjudicial days as to acts done in vacation. And notwithstanding the extensive powers of judges of courts required or permitted to be always open, it is obvious that these powers might be so used as to constitute an abuse of the power, and hence an irregularity which would entitle an injured party to a new trial. For instance, a judge might insist upon holding court at such unreasonable hours or sessions of such length that it would deprive a party of a fair trial.

Undoubtedly irregularities may arise from a failure to hold court at the place designated by law; but as in the case of the time for holding court, the question which would arise would usually be jurisdictional, and could be reached more expeditiously and effectively by summary and extraordinary remedies than by motion for new trial.

§ 39. With reference to the disqualification of judges.

The matters which disqualify judges are set forth in section 170 of the California Code of Civil Procedure, and statutes containing substantially the same provisions are found in most of the states. Since the disqualification of the court is jurisdictional,¹¹ and since an appeal is now generally provided from the order granting or refusing to grant a change of the place of trial, it is thought that new trial is not the appropriate remedy where a judge proceeds to try a case, notwithstanding a statutory disqualification.

§ 40. With reference to the order of trial.

The Code of Civil Procedure of California contains several sections relating to the conduct of trials. Such statutes are enacted with a view to establishing a certain and natural order of procedure that the ends of justice as embodied in the final result may be equally, fairly and expeditiously attained. The same policy underlies similar statutory provisions found in

vacation not being fatal to the jurisdiction of the court, if appellant desired to object to the court's rendering a judgment without a further hearing, they should have done so at the time."

¹¹ North Bloomfield G. M. Co. v. Keyser, 58 Cal. 315.

§ 41. Order of argument.

Wherever the statutory order of argument in criminal cases is fixed by statute, the statutory order must be pursued, and a departure from it will usually entitle the defendant to a new trial.¹⁴ The question is no longer one of material importance. The California statute¹⁵ now gives the prosecuting attorney the right to close, but the provision is not mandatory; so that it is difficult to see how a question could arise herein upon which a defendant could be held entitled to a new trial. Some such statute is found in most of the states.

30 Pac. 835, cases of demurrers to answers. In the first of the above cases the defendants stated, among other matters in their answer, the following: "The above-named defendants, for answer to the complaint filed herein, allege as follows: That the said complaint does not state facts sufficient to constitute a cause of action, this being a suit for an injunction, inasmuch that plaintiff has not alleged in his complaint that he has exhausted all remedy at law, or that he is without remedy at law." The court, in affirming the judgment from which the defendants appealed assigning the failure of the court to dispose of the issue of law thus raised, said: "When there are both issues of law and fact, and the cause is brought on to trial, and the issues of fact are tried and a judgment rendered in the cause, the presumption will be indulged that the issue of law was disposed of previously by an order overruling the demurrer, or that the demurrer had been waived or withdrawn. The demurrer that the complaint does not state facts sufficient to constitute a cause of action was called by the defendants an answer, and though it may, for aught that appears, have been allowed by them to sleep undisturbed in its misplaced position, we shall not presume the court omitted to dispose of it in its proper order, unless it was in effect waived or withdrawn from the record. Nor should we be inclined to disturb the judgment, even were it made to appear that the court omitted to pass directly upon the question of law suggested by the portion of the answer above quoted. If the defendant wishes to obtain a decision of the court upon a question of law arising upon the face of the complaint in advance of the trial of the cause, upon an issue of fact joined, the proper practice is to do so by a demurrer in terms as a distinct pleading. The practice of mixing matters of law and fact in the same pleading is not to be commended, and should be discountenanced by all engaged in the administration of justice."

¹⁴ See *People v. Fair*, 43 Cal. 137, 151; *People v. Mortimer*, 46 Cal. 114.

¹⁵ Penal Code, section 1093, providing that "the district attorney, or other counsel for the people, must open, and the district attorney may conclude, the argument."

Irregularities in administering oaths, and omitting

omission of an oath prescribed by statute to be administered, bailiffs in charge of juries, or witnesses giving money, or of any substantial part of such oath, has been held to be sufficient irregularity to require a new trial. The California Code of Civil Procedure¹⁶ prescribes the oath for jurors in civil cases, and the Penal Code¹⁷ the oath for jurors in criminal cases. There is no notable difference between the statutes of the various states with respect to the oath. A literal compliance is not required; a substantial compliance will suffice.¹⁸ The substance, however, must be observed.¹⁹ And where the record set forth that the jurors were "sworn the truth to speak upon the issue between the parties," and the statute required them to swear "that they will well and truly try the matter in issue between the parties, and true deliverance make between the plaintiff and the prisoner at the bar, whom you shall have sworn to according to evidence given you in court, and the state, so help you God," the judgment was reversed and a new trial ordered.²⁰ It has been recently held,

in *People v. ...*, 504, reading as follows: "As soon as the jury is sworn, the oath must be administered to the jurors, in substance that they will well and truly try the matter in issue between the plaintiff, and ———, defendant, and a true verdict render according to the evidence."

In *People v. ...*, 1437, reading as follows: "The court must administer the following oath: You do swear that you will well and truly try the issue between the People of the State of California and the defendant, and a true verdict render, according to the evidence."

In *People v. Angelo*, 18 Nev. 425, 429, 4 Pac. 1080; *Faith v. State*, 100 Cal. 100, 33 Pac. 100. In both these cases the jury were sworn to try "this case according to the law and the evidence," instead of "the issue," etc., "according to the evidence."

People v. Rollins, 22 N. H. 528; *Harriman v. State*, 2 Greene, 171; *State v. ...*, 3 Minn. 444; *Bawcom v. State*, 41 Tex. 191; *State v. ...*, 41 Tex. 515; *Edwards v. State*, 49 Ala. 336; *State v. ...*, N. C. 611; *State v. Tommy*, 19 Wash. 270, 53 Pac. 157; *People v. ...*, Territory, 2 Wash. Ter. 381, 7 Pac. 872.

People v. ..., 2 G. Greene (Iowa), 270. See, also, *Patterson v. State*, 7 Ark. 59, 44 Am. Dec. 530, where jury simply sworn to

however, in Texas that it is too late after the trial to object that a juror in a civil action was not sworn,²¹ and the doctrine is in harmony with the practice generally with reference to irregularities not per se prejudicial. Failure or neglect to call attention to it in proper time may be without injustice construed as a waiver of the irregularity. In criminal cases a more rigid observance of this mandatory requirement of statutes is enforced.

It was held ground for a new trial that the bailiff having charge of the jury was not previously sworn, as required by statute,²² and the omission of that part of the oath, "without food except such as the court shall order" was held to render the conviction of the defendant invalid.²³ As to whether a new trial should be granted in such case in the absence of other showing, the decisions are not in accord. In Illinois it was held that the irregularity was fatal regardless of any showing that might be made.²⁴ In Iowa, it was held that in order that a failure to swear the bailiff in charge of the jury, as required by the statute, should avail the defendant, some misconduct or irregularity must be shown to have resulted from such failure.²⁵

It was also held to entitle the defendant to a new trial where one of the state's witnesses, who gave evidence against him, was not sworn, and the omission was not discovered until after verdict.²⁶ In this case the decision was based upon the constitutional guaranty of the right of the defendant in a criminal prosecution to be confronted with the witnesses against him, one not being a witness until he is sworn. But it would appear to fall more properly under the head of an

"speak the truth"; *Bell v. State*, 10 Ark. 536, where jury simply sworn "to try the issue joined," held insufficient in both cases.

²¹ *Burns v. Matthews* (Tex. Civ. App.), 46 S. W. 79.

²² *State v. McCormick*, 57 Kan. 440, 57 Am. St. Rep. 341, 46 Pac. 777.

²³ *State v. Lashell*, 9 Kan. App. 887, 61 Pac. 678.

²⁴ *Jackson v. People*, 126 Ill. 139, 18 N. E. 286.

²⁵ *State v. Crafton*, 89 Iowa, 109, 56 N. W. 257. See, also, *Lancaster v. State*, 91 Tenn. 267, 18 S. W. 777; *United States v. Ball*, 163 U. S. 662, 18 Sup. Ct. Rep. 1192.

²⁶ *State v. Lugar*, 115 Iowa, 268, 58 N. W. 333.

irregularity in the introduction of evidence. In another case²⁷ this was held not to constitute ground for a new trial, unless the defendant objected to the witness testifying, especially in view of the fact that his counsel cross-examined the unsworn witness, as one fully qualified. The latter decision is a more reasonable view and is in keeping with the theory that it is a mere irregularity which may be waived, and not the deprivation of a constitutional guaranty.

§ 43. **Irregularity in judge absenting himself during trial.**

The judge may not absent himself from the courtroom, or otherwise relinquish control of the proceedings; and if he do so it is an irregularity warranting a reversal or new trial. In *People v. Blackman*,²⁸ the court said: "Something more is required of the presiding judge than that he should be within hearing. That might be true if he were on the street and the windows of the courtroom open; and it may be true in this case, as the judge stated, that when in the adjoining room, with the doors shut, he 'can hear all that is going on in the courtroom,' but it must be obvious that he would be in no position to have control of the proceedings and certainly would not be presiding in the cause when in an adjoining room with the door open or shut. If any misconduct took place in the courtroom during such absence there would be no judge present to whom defendant's counsel could make complaint, or to determine what occurred in his absence." And in *People v. Tupper*,²⁹ the court said: "The judge is a component part of the court. There can be no court without the judge. And all that was done in the absence of the judge was done in the absence of the court. A defendant convicted under such circumstances has been deprived of his liberty without due process of law." This view conforms to that of other courts.³⁰

²⁷ *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046. To same effect, *State v. Hope*, 100 Mo. 347, 13 S. W. 490.

²⁸ 127 Cal. 248, 251, 59 Pac. 573.

²⁹ 122 Cal. 424, 68 Am. St. Rep. 44, 55 Pac. 125.

³⁰ See *State v. Deuerman*, 59 Kan. 586, 53 Pac. 874, where numerous cases are cited. In this case the court said: "He [the judge] cannot even temporarily relinquish control of the court or the conduct of the trial. . . . It is especially important that he should be visibly present every moment of the actual progress of a crim-

§ 44. Irregularity in complying with request of jury for further instructions, or irregularly advising jury.

Aside from errors which may be committed by the court in the instructions given by it, there may be a disregard or infringement of rules of procedure prescribed by statute in the time or manner of instructing the jury, amounting to an irregularity on the part of the court requiring a new trial. An excellent illustration of this proposition is found in *State v. Fisher*,⁵¹ where the court, having given correct instructions

final trial where the highest penalty of the law may be imposed. . . . If the presiding judge abandons the trial, or relinquishes control over the proceedings, the accused has good cause to complain."

⁵¹ 23 Mont. 540, 553, 59 Pac. 919. Consent to an oral charge, or to any modification of or comment thereon, may not be inferred from the silence of the defendant or his counsel: See, *People v. Chaves*, 26 Cal. 78; *People v. Kearney*, 43 Cal. 384; *People v. Prospero*, 44 Cal. 186; *People v. Hersey*, 53 Cal. 574; *People v. Banks*, 1 Nev. 33. In *People v. Hersey*, *supra*, the court said: "Section 1093 of the Penal Code, as amended in 1874, is not substantially different from the statute under which these decisions are made. It explicitly provides that if the charge be not given in writing, it must be taken down by the phonographic reporter, the only change being that the charge need not be in writing, provided that it is taken down at the time by the phonographic reporter. In either event, the charge is thus reduced to writing, either by the judge or by the reporter, when it is given, and there can thereafter be no uncertainty as to what the charge was. But if the court could charge the jury orally in the absence of the phonographic reporter, and could thereafter require him to take down the charge, according to the recollection of the judge, as to its contents, it would introduce into the proceeding the very element of uncertainty which it was the purpose of the statute to prevent. Nor can the practice pursued in this case be supported under section 1138 of the Penal Code, as amended in 1874, which provides, in substance, that after the jury has retired for deliberation, if they desire to be informed on any point of law arising in the case, 'the information required must be given in the presence of, or after notice to the district attorney, and the defendant, or his counsel, or after they had been called.' This was not intended to authorize an oral charge which, at that stage of the proceeding, might often be productive of more pernicious results than if the original charge was oral. When the jury asks to be further instructed as to the law of the case, it is usually on points which they deem to be, if not decisive, at least entitled to serious consideration; and if the parties are called and do not appear, the court may proceed to instruct the jury in their absence, in which event, if the

in writing concerning the testimony contained in the defendant's affidavit admitted by the prosecution, orally in their return into court for further information that they could consider nothing given on the witness-stand. The action was held to be irregular in that said instructions upon their application were not in violation of the statute. The whole matter is made so plain at the point appears of such considerable weight as to justify a quotation of some length. The court designates the episode an error, but it was also an irregularity in the giving of instructions. The court said (per Justice) that the general instructions and comments by the court constituted an admitted error prejudicial to the defense. The defendant had applied for a continuance to take depositions, setting forth in his affidavit that the witnesses, if present, would testify that his character for morality was good in the neighborhood, and the state admitted at the trial that the witnesses, if present, would so testify. In the written opinion in this matter the law was correctly declared in the following clause: "The fact that a man, upon conviction of a crime, has had a good character in the neighborhood in which he has proven by competent evidence to his credit." The court is the judge of the evidence, the jury of its weight. It is not to be understood that the court intended to raise in the minds of the jury the question whether the evidence which the state admitted was sufficient to prove character. This appears from the fact that by the foreman, the jury desiring to exercise its right to consider the defendant's character, the court has the right to consider this man Fisher.

It is to be observed that if the charge be oral, they would have no opportunity to object, except from the recollection of the trial. It is to be observed that the introduction into the proceeding the element of character is not the especial purpose of the statute to prevent the introduction of the most critical period of the trial."

nothing of it, and we have no right to draw conclusions.' 'We are to take the evidence as we hear it on the stand. We have no right to consider anything else.' In answering, the judge said: 'No. . . . But you can't take anything outside of the testimony given before you upon the witness-stand. . . . Now, do you understand, gentlemen, that you are the sole judges of anybody's testimony that is given upon the stand? . . . And what weight in that connection with the question that the foreman asked me, that you shall give the affidavit of the defendant as to what certain witnesses will swear to, as the court has instructed you before, is a question for you to decide. You may give it great weight, or give it no weight. The court has nothing to do with it.' Foreman: 'But the fact that the defendant hasn't these depositions that he speaks of should not prejudice us against him at all.' The judge answered: 'No.' By these remarks the jury were misdirected. They were bound to accept the affidavit of the defendant as true, it was not to be weighed by the jury; the affidavit stated that certain witnesses, if present, would testify to good character, and the state admitted such to be the fact. In considering the question of the defendant's guilt, and as bearing upon it, the weight to be given, not to affidavit of the defendant, but to the evidence of good character, was for the jury. When the judge told the jury that they must consider nothing outside of the testimony given before them upon the witness-stand and that the defendant's failure to produce the depositions of the character, witnesses should not prejudice the jury against him, the error was emphasized. True, the written charge, with the exception already pointed out, contained a correct and sufficiently full statement of the law upon the subject, but the oral instructions and comments were repugnant to the charge."

But if the jury in a criminal case ask for further instructions, it is no ground for a new trial that the court gave other instructions, or points other than that upon which further instructions were asked, unless it also appear that the jury were misled by such additional instructions.³² But of course such additional instructions must be given according to the prescribed forms of the statute just discussed.

³² *People v. McKay*, 122 Cal. 628, 55 Pac. 594.

cations between court and jury are very jealously

Any information or suggestions imparted by the to the jury otherwise than in the manner prescribed or through approved channels and by established usually be held ground for new trial without circumstances or motives, unless the absence of previous. Accordingly, a judgment was reversed and ordered where the presiding justice entered the while the jurors were considering the verdict, though out of the jury, it being further shown that a juror on his turning to leave with what offense the defendant charged and the judge informed them that it was not proper to say so."³³

v. Linzey, 79 Hun, 23, 29 N. Y. Supp. 560. See, also, *Wash.*, 15 Wash. 621, 47 Pac. 106. Federal judges appear to exercise latitude in charging and advising juries than state judges under prevailing statutes: See *Allen v. United States*, 12, 17 Sup. Ct. Rep. 154. In the *Washington* case above, the record certified by the judge showed that after the jury were discharged and retired, "and soon thereafter the jury, through their request, returned to see the judge, and the said judge, being the judge who tried the cause, went to the juryroom and stood in the juryroom with the door to said juryroom partly opened; that the said judge returned and informed the counsel for the defendant that the jury, through its foreman, had requested the said judge repeat to them the instruction given to the jury without reasonable doubt." The court, per Justice Gordon, said: "The record certified by the appellant's counsel that this constituted a reversible error on the part of the trial judge as requires a reversal, and the contention must be sustained. In the discharge of his duty, the place for the judge is on the bench. As to the judge, he has closed the portals of the juryroom, and he may not leave the bench. The appellant was not obliged to follow the judge to the juryroom in order to protect his legal rights, or to see that the jury was discharged by the presence of the judge; and the state cannot attempt to show what occurred between the judge and the jury in a place where the judge had no right to be, and in regard to which no official record could be made. But learned counsel for the appellant insist that the judge said nothing to the jury, and hence that the error could not have been prejudicial to the defendant. But the court is not subject parties litigant to the disadvantage of being required to accept the statement of even the judge as to what he said to himself and the jury at a place where the judge has no right to be, and where litigants cannot be required to attend. It

§ 45. Irregularity in failing to send out instructions or other papers with jury.

In some states the written instructions submitted to be handed to the jury upon their return such is the case, it is a serious irregularity in the jury part and deliver part, especially if the instructions withheld be important to such an extent or that the verdict might have been thereby affected. The Montana statutes it is discretionary with the court elects to deliver the instructions to be so delivered. And where, though by mistake the instruction was overlooked and kept in court

is the lawful right of a party to have his cause heard with opportunity to be present and heard in the trial transacted. It is his right to be present and whenever it is found necessary or desirable for him to communicate with the jury, and he is not required to have memory or sense of fairness of the judge as to the judge and jury at any time or place, when he is to be present. His right in this respect goes to the trial by jury. Aside from the rights of the parties, the court will not sanction any departure from the rule that all such communications shall be public, and to the parties or their counsel." In *Sargent v. Ives*, 11 Am. Dec. 185, the judge sent a written communication and caused it to be filed, so there could be no objection in terms, and there was nothing in it which was objectionable, yet, because of its being made out of court, and to the parties, it was held improper and illegal. In *Parker*, delivering the opinion, basing the decision on grounds of public policy, saying, in part: "The court requires that litigating parties should have nothwithstanding suspect in the administration of justice, and the interest of jurors is of small consideration compared with the public interest. . . . It is better that everybody should suffer than that a practice should be continued which is capricious, at least, of being the ground of uneasiness and jealousy." *Cambridge*, 124 Mass. 567, 28 Am. Rep. 690, is reached, the court remarking, "the court will not sanction the communication was, in fact, erroneous or also, *Taylor v. Belsford*, 13 Johns. 487; *Waterto*, N. Y. 553.

tention of the jury to the great expense of getting another jury and retrying the case and sending them back for further deliberation.³⁸ Accordingly, it was held not error for the court to say to the jury, after they had been out fifty-eight hours: "This cause has been a great expense to the county . . . and it ought to be decided; and, while I do not ask you to yield any question of conscience, you must not be obstinate, or too tenacious of your views."³⁹ And a remark of the court to the jury at the close of its charge on Saturday that if they did not agree before 8 o'clock Sunday morning they would have to remain together in charge of the bailiff until Monday morning, was held not prejudicial to the defendant, where the jury returned a verdict on Saturday night.⁴⁰

But the decisions to the effect that the court may call attention to public expense of trials are not uniform. In Montana it was held an irregularity of the court for it, upon the announcement by the jury of their inability to agree, to call their attention to the expense incident to a new trial, as a reason why they should reach a verdict; as to whether that alone would entitle the defendant to a reversal and new trial the court did not decide.⁴¹

But if the admonition be accompanied with suggestions favorable to one side or the other, or assume the form of a reprimand for failing to agree, or suggest the folly or absurdity of a failure to agree, whether in connection with or without suggestions of expense and hardship to one of the litigants of retrying the case, it will be ground for setting aside the verdict and awarding a new trial. Thus it was held reversible error, and to necessitate a new trial for the trial court, in lecturing the jury upon the necessity of agreeing upon a verdict, to use language reflecting upon the intelligence of a part of the

³⁸ See *Jordan v. State* (Tex. Cr. App.), 30 S. W. 445.

³⁹ *Johnson v. State*, 60 Ark. 45, 28 S. W. 792. See, also, *State v. Gorham*, 67 Vt. 365, 31 Atl. 845; *People v. Engle*, 118 Mich. 287, 76 N. W. 502.

⁴⁰ *Territory v. McGinnis*, 10 N. Mex. 269, 61 Pac. 208.

⁴¹ *State v. Fisher*, 23 Mont. 540, 555, 59 Pac. 219. The case was reversed upon other points; but the court remarked: "It was improper for him to direct the attention of the jury to the expense incident to a new trial, as a reason why they should reach a verdict."

appreciate the circumstances and situation will make one more effort to do it.' The the jury then returned a verdict of ten plaintiff, in from ten to twenty minutes.'

Equally reprehensible and equally reversing the judgment and ordering a n sions to the effect that the jurors are unre if they do not agree, in view of the eviden pecially is this true in criminal cases, whe only to stand upon his right to require p yond a reasonable doubt. In such cases co that from the failure of the court to direc close of the evidence for the prosecution, that the court believe a case is made w verdict of guilty, and when the court supj remark or statement to the effect that th difficulty in agreeing, the jury may well c ence that the court believes there is no ro doubt. This principle and the reasoning clearly pointed out in *People v. Kindleberg* judge had, upon a juror stating that there an agreement, commented severely upon t unwarranted presumption of certain class pen to be chosen on juries, closing with peat, gentlemen, that I see no reason on this case, upon this testimony, cannot a the case and ordering a new trial the sup Haven, J., said: "Nothing can be clear charge the judge informed the jury that definite conviction in regard to the verdict return, and that in his opinion the evide conclusions was so plain and satisfactory telligent jurors who had heard the testimo agree as to its weight and effect, and we th stood, or at least may have understood, fr remarks that in the opinion of the judge guilty, and that such should be the verdis trial of a defendant the evidence is clearly i a verdict of guilty, it is the duty of the ju

indications pointed that way, sent them back that they "be as expeditious as you conveni about twenty minutes a verdict of guilty was of the court was held reversible error, and to grant to a new trial."⁴⁶

§ 47. Lecturing jury.

Of a similar character and treated similar effect in entitling a party to a new trial, as t influencing the jury during their deliberation party, are remarks or advice by courts to ju withdraw their minds from the merits of the sometimes delivered at other stages of the cas delivered upon an announcement by the jury to agree, after final retirement. These may designated as "court lectures to juries." The embodied in instructions, in which case the different head,⁴⁷ constituting, if carried to they often are found elsewhere than in the Court lectures to juries are uniformly regard by the profession and by appellate courts. T jectionable than those which carry the stamp they insidiously accomplish the same evil end court's anxiety for an agreement, it goes be pressions, or makes any special appeal, the which is to induce a juror to surrender his ow found, and then refuses a new trial upon app that ground, a new trial will be ordered on a a trial for assault with intent to kill, the jury t their disagreement. The court then address stance, as follows: That considerable time ha and, if they did not agree, the case would ha another jury, who could not arrive at a verdict they could; that it was their duty to agr scientiously could; that they should pay prop opinions of each other; that the single object t to arrive at a true verdict, which could only be tion and mutual concession; that no juror sh

⁴⁶ *Bennett v. State*, 10 Ohio C. C. 84.

⁴⁷ See post, §§ 302-331.

to the same conclusions; and this unanimous conclusion of twelve different minds is the certainty of fact sought in the law."

There is never any good reason why the court should unduly concern itself about hung juries and retrials. There are usually courts enough to conduct the judicial business of a given state, and if not the fault lies at the door of the legislative department. The same may be said as to the matter of expense. The legislature can make trials cheap or expensive at will.

§ 48. Misconduct of court in animadverting upon conduct of counsel.

Intemperate animadversion or reflection by the court upon counsel for a party, in the presence and hearing of the jury, especially when undeserved, sometimes has an effect similar to that produced by an adverse comment upon the merits of the party's cause or defense. And where the trial judge assailed, in the presence of the jury, counsel for defendant with offensive language, such as to imply that he was an intruder in court, and the verdict was against the defendant, it was held that a new trial should be granted.⁵⁰

§ 49. Misconduct of court in commenting upon testimony and witnesses during trial.

Of more importance, because of more frequent occurrence, than prejudicial censure of counsel, is irregularity consisting in improper remarks and comments, by the judge, upon the testimony, deportment and character of parties and witnesses at the trial. In passing on the various matters necessarily incident to a trial, a judge must not make remarks in presence of the jury that are intended for their guidance. But the instructions are ordinarily sufficient to correct any impressions thus created.⁵¹ Where, however, on the trial of a physician for manslaughter, caused by producing an abortion which resulted in the death of the mother, the state offered to prove by a witness, who was a cook by occupation, that the deceased was pregnant, it was objected that the witness was incompetent.

⁵⁰ Walker v. Coleman, 35 Kan. 381, 49 Am. St. Rep. 254, 40 Pac. 640.

⁵¹ See Boyd v. Portland Elec. Co., 40 Or. 126, 66 Pac. 576.

it, in overruling the objection, said: "Anybody can tell a woman is pregnant or not at times by her looks, from observation. There is a great deal of humbug about science . . . and medical testimony. . . . There is a man practicing medicine who ought to be a second-class in a third-class hotel." This was held prejudicial and sufficient ground for a new trial.⁵² So stated the trial judge reflecting severely upon the character of the principal witness for the plaintiff, and his refusal upon the plaintiff's attorney to instruct the jury that his reference to the witness was improper, were held such misconduct as to require a new trial.⁵³

In reference to remarks of courts prejudicial to defendants in criminal cases, a distinction has sometimes been taken between those addressed directly to the jury and those addressed to the court within the presence and hearing of the jury.⁵⁴ But in *People v. Willard*⁵⁵ it was held to be prejudicial error for the court, in the presence and hearing of the jury, in ruling on an objection to evidence, to refer to contradictions in the testimony of a witness, and that such remarks, being unre-

People v. Clements, 15 Or. 237, 14 Pac. 410.

People v. Lorch, 49 App. Div. 638, 63 N. Y. Supp. 567.

People v. McLean, 84 Cal. 480, 24 Pac. 32. See, also, *Reed*, 47 Cal. 200.

People v. Willard, 84 Cal. 482, 28 Pac. 585. In reversing the judgment and ordering a new trial, the court said: "The court, in ruling upon an objection to the admission in evidence of the letter, exhibit 'B,' in reliance upon the testimony of the defendant in relation to it, and, in the presence and hearing of the jury, that 'she had testified herself several times in the record,' to which language the defendant excepted. Whereupon the court reiterated the statement, 'that is the chief reason why I admit those letters in evidence.' We do think these remarks were necessary to explain the action of the court, and we do not think that, unretracted and uncorrected, after they had been objected to, they must necessarily have prejudiced the case of the defendant. She was her own sole witness, and, in effect, the jury were told by the court that she was not credible. Even if her self-contradictions had been much more apparent than they appear to us, the judge should not have given an instruction to the jury that she had sworn falsely. 'Judges shall not instruct the jury with respect to matters of fact, but may state the law and declare the law': See, also, *McMinn v. Whelan*, 27

tracted and unexplained, amounted to a opinion of the court that the witness had striking instance of an improper, or unfort the court in a criminal case and a clear exp same should be viewed in relation to its pr the minds of the jurors is found in State defendant's attorney, in the trial of that c examination of a female witness, who was the state, sought to affect her credibility by was lewd and immoral. During the argume to the admission of such evidence, the court, the jury, said: "It does not follow that be lewd, that it affects her veracity." In rever ordering a new trial for this, the supreme co the least, this was an unfortunate remark, no doubt an honest expression of the court's in answer to the argument of counsel, it was the province of the jury, who are, under on clusive judges of the credibility of a witnes dicial error. It is of the highest importanc tration of justice that the court should never ince of the jury, or by word or act intimate i question of fact, or the credibility of a wi of the supreme court of California of such same in civil as in criminal cases, and was an early case: "From the high and authorita judge presiding at a trial before a jury, l them is of vast extent, and he has it in his p actions, or both, to materially prejudice the ests of one or the other of the parties. By w may, on the one hand, support the character witness, or, on the other hand, destroy the mation of the jury; and thus his personal an is exerted to the unfair advantage of one of t corresponding detriment to the cause of th

⁵⁶ 24 Or. 168, 174, 33 Pac. 538. Citing State 244, 14 Pac. 410; *McMinn v. Whelan*, 27 Cal. 319 Ala. 236; *Fuhrman v. Mayorre*, 54 Ala. 263; A 77 Ill. 377.

⁵⁷ *McMinn v. Whelan*, 27 Cal. 300, 320. See, al 7 Nev. 383; *State v. Tickel*, 13 Nev. 512; *State*

sed in a civil action shows that like reason makes ble to one class of jury trials as to another.⁵⁸ The will not in every instance warrant a reversal or Of course, slight departures from the rules of probe given but slight consideration; and it is usually power of the court to cure the infringement of the nce, or remove its effect.⁵⁹

ble latitude is uniformly conceded to the trial court upon questions which arise during the trial touch- missibility of evidence. It very frequently occurs

'97; *Sharp v. State*, 51 Ark. 155, 14 Am. St. Rep. 33, 10 *Winer v. State*, 28 Fla. 146, 29 Am. St. Rep. 247, 9 South. . *Rogers etc. Co.*, 38 W. Va. 232, 18 S. E. 563; *State v. V. C.* 222. In the first Nevada case above cited, the ng upon an objection to evidence offered by the prosecu- pressed the opinion that there was as much evidence in he contention of the prosecution as to whether a given tablished as per contra. For this the judgment was l the cause remanded for a new trial, the court saying: n here expressed was entirely uncalled for. It was not order to explain the ruling, to say anything about the ght of the testimony. It was enough that there was ficient in law to authorize the jury to infer from it t the deceased sustained the injury in question at the s defendant. The necessity imposed upon the court of question of law, whether there was any evidence from ury could draw a certain inference, afforded no pretext uncement of an opinion on the question of fact as to if such evidence, as compared with other testimony in

so, *Savannah etc. Ry. Co. v. Hardin*, 110 Ga. 433, 35 In this case the court, in the jury's hearing, used lan- ated to impress them that in the court's opinion plaintiff to recover the amount sued for, and there was evidence i finding for plaintiff for less than actually found. It ew trial must be granted.

Osnes, 14 Mont. 553, 37 Pac. 13. In this case the court, the obstinacy of the defendant, upon a new trial for l him, with some display of temper, for refusing to per question on cross-examination; but afterward, when .t answered the question upon advice of his counsel, re- me, and admonished the jury not to permit themselves iced thereby. It was held that such occurrence was not authorize a new trial upon the ground that the court iscretion to the prejudice and injury of the defendant.

at a trial that the sufficiency of an objection to a question depends upon the presence of other evidence in the case—such as whether it is proper cross-examination, or relevant to what was stated on direct examination, whether a proper foundation has been laid, whether the form of the question properly meets the statement of a witness already given, whether the testimony offered is merely cumulative. Such objections are directed to the court, and, for the purpose of sustaining its ruling, it is frequently necessary for it to state to counsel evidence that has already been given, in order that the correctness of its ruling may be apparent. While the jury may hear what is said by the court, its remarks or its statement of the evidence is not in the nature of an instruction to them, and it is not to be assumed that they will be influenced by it.⁶⁰

§ 50. Controlling examination of witness and limiting cross-examination.

To direct and control within proper limits the examination and cross-examination of witnesses, to the end of securing to all parties the full enjoyment of their rights and eliciting all facts tending to aid in arriving at the ultimate truth, without unduly encumbering the record or wasting the time of the court to the detriment of the public or of other litigants, is peculiarly the province of trial courts.⁶¹ And yet an arbitrary exercise of this discretion, whereby a party is deprived of an element of a fair trial, will constitute an abuse of discretion warranting a new trial or reversal. An instance of such abuse and of a reversal of the judgment, as well as of the order denying a new trial, is found in *Estate of Kasson*.⁶² The facts are set forth in such detail in the printed report as to forbid the inserting here of even a synopsis. Enough appears in the following portion of the opinion, however, for an understanding of the views of the court: "It is not true, as a legal proposition, that in a proceeding under section 1664 one party can be rightfully precluded from cross-examining a hostile witness as to a

⁶⁰ See *People v. Mayes*, 113 Cal. 618, 45 Pac. 860. Cited and approved in *People v. Woon Tuck Wo*, 120 Cal. 294, 295, 52 Pac. 833; See, also, *People v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

⁶¹ *People v. Mooney*, 132 Cal. 13, 63 Pac. 1070; *People v. Harlan*, 133 Cal. 16, 65 Pac. 9.

⁶² 127 Cal. 496, 505, 59 Pac. 950.

tain matter, upon the ground that another party had previously examined him as to that matter. Under this section a person who appears, and either by complaint or answer sets up a claim of heirship, peculiar to himself, is an actor, and has a separate and independent right to conduct his case according to his own judgment, including the right to ask proper questions of witnesses of hostile parties. After the parties have been brought into court by petition, notice, etc., the one who chooses first to file a complaint is called, for convenience, 'plaintiff,' and the others are called 'defendants,' and their pleadings are called answers; but the requirement as to each pleading is substantially the same—that is, it must set forth the facts constituting his claim to heirship, etc. The averments of the pleadings show which parties are hostile to each other, and each has a right to cross-examine the witnesses of the hostile party. In the case at bar, the attitude of appellant is adverse to that of all the other parties. She had her own story of her case, and her counsel could not be compelled to follow his judgment as to cross-examination of a witness to that of counsel for plaintiff. Of course, in a proceeding under section 1664, when there are numerous parties, a court could, in its discretion, prevent frequent and apparently useless repetitions of the same questions by different parties; but the rulings of the court in the case at bar above set forth, as predicted by the record, cannot be justified on that ground." The court designated the conduct of the lower court as an error, but was clearly an abuse of discretion, and as such is properly considered in this chapter.

1. Misconduct consisting of improper demeanor of court toward witnesses.

The trial court may as well prejudice a party's cause or cause in the minds of the jury by conduct toward a party, or toward his own or his adversary's witness, as by words spoken directly discrediting or inspiring belief in his testimony. Nothing can be more reprehensible, not to say disgusting, than the display of intimacy and good fellowship between judge and witness, or court and party, especially if testifying in the cause at the time. And where the judge in a criminal trial read a newspaper while the defendant was on the witness-stand, and conversed pleasantly and familiarly with a witness for the

prosecution, whose testimony defendant's counsel was trying to impeach, it was held such improper conduct as would warrant the granting of a new trial.⁶³

§ 52. Submitting wrong cause of action to jury.

It sometimes happens that a complaint contains two counts setting forth causes of action founded upon the same transaction, or state of facts, and at the trial the plaintiff directs his

⁶³ *State v. Coella*, 3 Wash. 99, 120, 28 Pac. 28. The court made very clear and proper comment upon the conduct of the trial judge, as follows: "As it is made to appear to us, these proceedings amounted to something more than undignified conduct upon the part of the judge, and would naturally impress the jury adversely to the defendant's case. . . . The solemnity of a trial upon the issue of which hangs the life of a human being, wherein it is to be determined whether such life shall be taken as a just penalty to satisfy the demands of justice outraged, if so found, can scarcely be approached in any other proceeding over which human beings have control. Certainly, any man connected therewith, filling an important position, in arriving at a decision therein, and fulfilling the duties of his position, would realize the awful responsibility resting upon him, and act with becoming dignity. The reading of a newspaper by the judge at the sole particular time while the defendant was upon the stand testifying, and it does not appear that he read it at any other time while the trial was in progress, would lead the jury—always quick to receive an impression from the judge, as well from his acts and manner, as from what he may say—to think that the testimony being offered was untruthful or unimportant, and unworthy of their consideration. Also, the witness whose testimony the defendant ought to impeach had testified to some very material matters against him, and it was of the very highest importance to weaken his testimony if he could do so, and he was entitled to discredit it in all legitimate ways, and to the benefit and effect of all rightful matters going to impair it. The marked conduct of the judge toward this witness, at the time, must have made a decided impression upon the jury. It was substantially saying to them that the judge believed in this man and indorsed his testimony, and the jury would naturally think that, as the witness enjoyed the confidence of the judge, they should not hesitate to believe him, notwithstanding the attack made upon him by the defendant. We have a constitutional provision prohibiting judges from commenting upon matters of fact to the jury. It was intended to prevent the judge from conveying to the jury his opinion upon the facts, in order that these matters might be left to the exclusive province of the jury. To allow a judge to so demean himself as to convey such information by his conduct would be more dangerous and subversive of justice than actual com-

system, as well as in the courts of those states in which the original partition between common-law forms of action and suits in equity is preserved, it is an irregularity entitling the complaining party to a new trial for the court, in an action projected and framed for equitable relief, to ignore its character and proceed to try it as an action at law before a jury, and upon the verdict to decree legal as well as equitable relief. Thus, in *Creighton v. Hershfield*,⁶⁵ it was held that in an equitable action to foreclose a mortgage, the court could not render a personal judgment against the mortgagors, and decree a sale of the mortgaged premises to satisfy such judgment; that the judgment was void, and that the trial court had properly granted a new trial. The subject of jury trials and of the right to a jury trial are subjects too large for the present purpose, and not necessary to be discussed. It is sufficient to state that where, under constitutional provisions, a party is entitled to a jury trial, and a trial is had without a jury, it is an irregularity entitling him to a new trial. Most of the cases hold that the judgment in such cases is void. If that be so it must be because the trial is wholly abortive and the entire proceeding a nullity. If that were fully conceded a more summary remedy might be resorted to than a motion for a new trial with its delay and labor. Still, there would have to be a retrial, or, if the term be more correct, a new trial, if the party resorted to a writ of mandate; and it has been settled by authority that the aggrieved party is under such circumstances entitled to a new trial.⁶⁶ The question is somewhat

⁶⁵ 1 Mont. 639, 643. See, also, *Gallagher v. Brassey*, 1 Mont. 457; *Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119; *Fenn v. Holme*, 21 How. (U. S.) 484; *Parsons v. Bedford*, 3 Pet. (U. S.) 446; *Bennett v. Butterworth*, 11 How. (U. S.) 669; *Dunphy v. Kleinsmith*, 11 Wall. (U. S.) 614; *Pfister v. Dasey*, 65 Cal. 403, 405, 4 Pac. 393, and cases cited.

⁶⁶ *Biggs v. Lloyd*, 70 Cal. 447, 11 Pac. 831; *Swasey v. Adair*, 88 Cal. 179, 183, 25 Pac. 1119; *Farwell v. Murray*, 104 Cal. 404, 406, 38 Pac. 199. These three cases fully present the law governing the question of waiver of the right. And it appears that a waiver in one of the ways provided for by statute must be shown. In *Biggs v. Lloyd*, the court said: "The constitution ordains: 'A trial by jury may be waived . . . in civil actions by the consent of the parties, signified in such manner as may be prescribed by law.' (Const., art. 1, § 7.) Section 631 of the Code of Civil Procedure

more complicated where there are both legal and equitable issues, the one requiring a trial by a jury and the other a trial by the court, as where the answer sets forth both legal and equitable defenses. Where that is the case, the proper rule of procedure is for the court to hear and dispose of the equitable defenses before proceeding to try the issues of law.⁶⁷

declares: "Trial by jury may be waived by the several parties to an issue of fact arising on contract, or for the recovery of specific, real, or personal property, with or without damages, and with the assent of the court in other actions, in manner following: 1. By failing to appear at the trial; 2. By written consent in person, or by attorney, filed with the clerk; 3. By oral consent in open court, entered in the minutes." These are the only ways in which the right to a jury trial shall be deemed waived; it cannot be waived in any other way." In subsequent cases this case has been cited. The above quotation goes far enough to justify the conclusion that a record on appeal should show an express waiver by one of the specified methods. But in that case, as in the other two cases, a jury trial was demanded and refused.

⁶⁷ *Swasey v. Adair*, 88 Cal. 179, 180, 25 Pac. 1119; *Arguello v. Edinger*, 10 Cal. 160; *Estrada v. Murphy*, 19 Cal. 273; *Weber v. Marshall*, 19 Cal. 457; *Lestrade v. Barth*, 19 Cal. 671; *Martin v. Zellerbach*, 38 Cal. 319, 99 Am. Dec. 365; *Fish v. Benson*, 71 Cal. 434, 12 Pac. 454. It may happen in many cases that the result of the trial of the equitable defense will obviate the necessity of the trial of the legal issues. The trial may dispose of all of the issues in the case, or the equitable relief granted may be such as to prevent the trial of the issues at law, as was the case in *Bodley v. Ferguson*, 30 Cal. 511. But whenever the trial of the equitable defense does not have such result, and the issues at law remain undisposed of, these issues are to be tried in the same manner as if no equitable defense had been interposed. In *Arguello v. Edinger*, *supra*, the court says: "If, upon hearing the evidence, the court should determine that there was ground for relief, it would enjoin the further prosecution of the action with its decree for a specific performance; and, on the other hand, if it should refuse the relief, it would call a jury to determine the issue upon the general denial." In *Weber v. Marshall*, *supra*, the court says: "The parties are entitled to a trial by jury upon the legal issues." In *Lestrade v. Barth*, *supra*, it is said: "The equitable defense should, therefore, be passed on by the court, as according to the determination of the claim of the defendant to the relief he seeks will the necessity of proceeding with the action at law depend." In *Martin v. Zellerbach*, 38 Cal. 319, 99 Am. Dec. 365, the court says: "The more regular and orderly practice in such cases clearly is, first to dispose of the equitable defenses set up in the answer. If these are found for

By making an equitable defense in such a case the defendant does not, however, lose any right which he has to have the issues of law tried by the court, by virtue of being called upon, to first hear and dispose of the equitable defense. It is to be expected that the court will first hear and dispose of the equitable defense and then pass upon all the issues in the case. It happens in many cases that the result of the equitable defense will obviate the necessity of trying the legal issues. The trial may dispose of all or part of the equitable relief granted may be the result of the trial of the issues at law.⁶⁸ But when an equitable defense does not have such effect, the law issues remain undisposed of, these issues must be tried in the same manner as if no equitable defense had been made. The proper practice was thus declared by the court in *Da Costa v. Belmont*, 10 Cal. 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

the defendant, it will obviate, in most cases, the law side of the action. But if found in favor of the defendant, he still has the right to be heard on his legal issues. In the first case above cited, the court said: "The defense referred to in the rule is properly an equitable defense existing in behalf of the defendant which is an independent suit brought by him against the plaintiff for the purpose of enforcing such right, but which may also be relied upon as a defense in an action brought by the plaintiff against him by the plaintiff. Such equitable defense must, however, be pleaded with the same particularity as is required in cases of equity. His answer, being in equity, must contain all the essential facts. He then becomes an actor with respect to the legal issues, and his defense must be of such a character as to result into a decree in his favor." See, also, *Da Costa v. Belmont*, 10 Cal. 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

⁶⁸ See *Bodley v. Ferguson*, 30 Cal. 511.

⁶⁹ *Arguello v. Edinger*, 10 Cal. 160. See, also, *Da Costa v. Belmont*, 10 Cal. 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

ies are entitled to a jury trial upon their legal
e be waived in the statutory method."⁷⁰

of court to compel election between courts.

as are improperly joined and charged in the
and the attention of the court being called to
proper motions, that being the practice in some
t fails to compel such election, this may be
defendant as an irregularity entitling him to a
cannot be said in such case that he has had a
rtial trial." For instance, where the indict-
a count for burglary and another for assault
commit rape, and the court refused to compel
the jury returned a general verdict of guilty.⁷¹
ictment contains two counts, one for burglary
eny, and a general verdict of guilty is returned,
re is no evidence of a burglary, should grant a
at cases of that import must be distinguished
re the crime charged includes a lesser offense,
t for the lesser offense is an acquittal of the
lingly, it was held not to entitle the defendant
murder to a new trial that the jury returned
t him for manslaughter, although the evidence
him guilty of murder and not manslaughter;
the power, under section 1159 of the Penal
t of any crime necessarily included in the one
e error, if any, not being prejudicial to the de-
this case the decision appears to have been con-
viction of the California Penal Code⁷⁴ provid-
her a departure from the form or mode pre-
code in respect to any pleading or proceeding,
r mistake therein, renders it invalid, unless it

marshall, 10 Cal. 457; Platt v. Havens, 119 Cal. 244,

simon, 18 R. I. 236, 49 Am. St. Rep. 766, 27 Atl. 446.
nson, 45 S. C. 483, 23 S. E. 619.

uhlner, 115 Cal. 303, 47 Pac. 128. See, also, People
Cal. 381; People v. Maroney, 109 Cal. 277, 41 Pac.
Lowen, 109 Cal. 381, 42 Pac. 32; People v. Jeffer-

has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." But the law is well settled to the same effect, even in the absence of such statutory provision.⁷⁵

§ 55. Irregularity pertaining to rights of accused in criminal case to be present, etc.

It is generally held to be an irregularity entitling the defendant in a felony case to a new trial if a verdict of guilty be returned against him in his absence.⁷⁶ So where, after the jury in a capital case had retired, they returned to have two depositions read to them, which was done in the defendant's absence, this was held to be an irregularity entitling him to a new trial.⁷⁷ A defendant may, however, waive his right to be present with the jury at a view of the premises.⁷⁸

Subject to the power of courts to receive sealed verdicts, or to have them filed with the clerk under statutes, the parties to civil actions have the right to be present at the return of the verdict, in order to have the jury polled, as well as to except to any proceedings which may transpire adversely to them. Still, it is the duty of counsel to attend at all stages of the trial, and

⁷⁵ See *Jordan v. State*, 22 Ga. 545, 549; *Barnett v. People*, 54 Ill. 325; *Commonwealth v. McPike*, 3 Cush. 181, 50 Am. Dec. 727; *Commonwealth v. Walker*, 108 Mass. 309; *Commonwealth v. Smith*, 151 Mass. 491, 44 N. E. 677; *Pratt v. State*, 51 Ark. 167, 10 S. W. 233. Many other cases could be cited to the effect that a new trial may not be granted upon such verdict.

⁷⁶ *People v. Beauchamp*, 49 Cal. 41. Principle affirmed in *People v. Jung Sing*, 70 Cal. 472, 11 Pac. 755; *Cranmer v. Kohn*, 11 S. Dak. 245, 76 N. W. 937. Failure to provide for presence of prisoner when jurors are viewing place of his confinement, and place of alleged killing, held not error (meaning irregularity): *State v. Moran*, 15 Or. 262, 14 Pac. 419. To same effect, *State v. Ah Lee*, 8 Or. 214. In the first case the prisoner absconded after the submission of the case to the jury, being out on bail, and the court said: "The growing frequency of occurrences of this character, thwarting the administration of criminal justice, would suggest the propriety in all trials for felony of promptly ordering the prisoner, regardless of his previous admission to bail, into actual custody, at the commencement of the trial, or immediately after upon the retirement of the jury to consider their verdict."

⁷⁷ *People v. Kohler*, 5 Cal. 72.

⁷⁸ *State v. Sasse*, 72 Wis. 3, 33 N. W. 343.

like proper arrangements for that purpose. They upon court bailiffs, and, in case of their neglect have a new trial without a showing of prejudice it is usually held that in such case some prejudice to appear. A slight showing of prejudice and in a case where the jury reached a verdict, and in the absence of counsel, and the verdict, had it filed and recorded and disapproved, and an application was made for a new trial party, whose affidavit alleged that had the jury efficient jurors would not have agreed to the verdict, it was held that the court properly granted

error in failing to advise defendant of his rights. Error similar to those discussed in the last paragraph may be committed where the defendant appears in court without counsel, and the court omits to advise of important rights. Thus, it was held that the failure to inform a defendant in a criminal case, having his right to challenge, before jury is sworn, is the error called error.⁸¹

v. Clark, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 319; *Strawger v. Sample*, 44 Kan. 298, 24 Pac. 425; *Reilly v. State*, 212, 48 N. W. 909; *Seaton v. Smith*, 45 Kan. 43, 100 Pac. 375; *Argue v. Carrillo*, 1 Ariz. 336, 25 Pac. 526; *Walker v. State*, 375, 54 N. W. 344. It is reversible error to refuse either party to poll the jury: See *Labor v. Coplin*, 121, 122 Pac. 375; *Gray v. Cook*, 4 Gilm. 336, 46 Am. Dec. 473; *Fox v. State*, 23; *Jackson v. Hawks*, 3 Wend. 619; *Laurence v. State*, 501.

Parker, 18 Wash. 206, 51 Pac. 368. In this case it was presented showing that had the jury been polled the verdict would have been different.

Moore, 103 Cal. 508, 37 Pac. 510. The opinion in *People v. McFarland* contains a valuable resume. Pertinent portions on the point are as follows: "We think, however, that under the circumstances of this particular case the judgment should be reversed for the failure of the court to inform the jury of the rights as provided in section 1066 of the Penal Code. The provision is as follows: 'Before a juror is called the defendant shall be informed by the court, or under its direction, that he has the right to challenge an individual juror he must do so when called.'"
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§ 57. Irregularities in process of impaneling jury.

This is obviously not the place for considering errors committed in ruling upon challenges to the array and to individual jurors. But many irregularities may occur in the process of selecting a jury, which if not waived may entitle parties to a new trial. One, for which the judgment was reversed and a new trial ordered, occurred in *People v. Zeigler*,⁸² where it

the juror appears, and before he is sworn.' In all the decisions of this court which have been called to our attention where this section of the code was under review it has been held that a failure to comply with it is error; although in those decisions the failure was held not to be prejudicial, because in each case the defendant had been represented by counsel competent to protect his rights, and the right of challenge had been exercised. In *People v. Mortimer*, 58 Cal. 266, the court, speaking of the provision of the code, say: 'The object of this provision of the law is to protect the rights of the defendant in the matter of challenging jurors. He should be informed of the fact that if he desired to challenge any particular juror he must exercise that right before the juror is sworn; but it appears from the record in the case that the defendant's rights in this respect were fully understood by him and his counsel, and the privilege of challenging jurors was exercised to a large extent in the case. It is true that the court omitted a duty imposed by law, but it clearly appears that the defendant was not in any manner prejudiced by the error complained of.' In *People v. O'Brien* 88 Cal. 489, 26 Pac. 362, the above language was quoted approvingly, the court holding also that under the facts in that case the error was not prejudicial. (See, also, *People v. Ellsworth*, 92 Cal. 594, 28 Pac. 604.) But the facts in the case at bar are materially different from those in the cases above noticed. Here the appellant had no counsel in the trial court, and did not exercise the right of challenge. There is nothing in the record to show that he was not prejudiced by the failure of the court to give the information required by the statute to be given—nothing which enables us to avoid the general presumption that the error is prejudicial: See *People v. Gaines*, 52 Cal. 479. The general rule that everyone is presumed to know the law cannot be successfully invoked in a criminal case against a statute which provides that the defendant must be specially instructed as to what the law is on a particular point."

⁸² 135 Cal. 462, 67 Pac. 754. See, also, *State v. Allen*, 59 Kan. 758, 54 Pac. 1060. In *People v. Ziegler*, *supra*, the court, per Temple, J., said (in part): "The course pursued in *People v. Stewart*, 64 Cal. 60, 28 Pac. 112, was in effect the common-law practice, where a juror was excused after the trial had commenced. That practice was to discharge the remaining jurors, but to immediately

was held that upon the trial of a defendant accused of murder, where the jury was partially impanelled, and an accepted juror was excused for sickness, the trial should have begun anew, and the jurors sworn should have been discharged and recalled for further examination and challenge, the effect being to restore to the defendant his entire number of peremptory challenges, to be used in the selection of twelve competent jurors, instead of confining his remaining peremptory challenges to an increased number of other jurors to be impanelled. The decision is in line with a prior decision of the same court,⁸³ nevertheless, the chief and two associate justices dissented, insisting that the reasoning in support of the prior decision was unsound. In the opinion, Justice Temple criticised and refused to follow a North Dakota case⁸⁴ in which the doctrine of the earlier California case was repudiated.

§ 58. Irregularity in failing to admonish jury.

That authorizing the jury to separate for any considerable time in a felony case, without being admonished as required by law, would entitle the defendant to a new trial, is obvious from the opinion of the court in *People v. Coyne*,⁸⁵ though, as no evidence had been taken, and as no probability of prejudice appeared, the court considered the objection too technical to entitle the defendant to a reversal and new trial. And it was

recall those who had been accepted and sworn. The effect of this otherwise useless formality was to restore to the defendant his entire number of peremptory challenges, and to permit him to challenge those already accepted. Those finally accepted were of course resworn. Conceding that the court rightly held that the trial had then commenced, the practice recommended was clearly right. This being the common-law method of beginning the trial anew was, I doubt not, what was intended. As to the main question, whatever we would feel inclined to hold if the question was now presented for the first time—the rule having been so well established—I think it should not now be changed.”

⁸³ See *People v. Stewart*, 64 Cal. 60, 28 Pac. 112. See, also, *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115.

⁸⁴ *State v. Haseldahl*, 2 N. Dak. 521, 52 N. W. 315.

⁸⁵ 116 Cal. 295, 297, 28 Pac. 218. See, also, *Johnson v. State*, 68 Ark. 401, 59 S. W. 34; *Barnes v. Commonwealth*, 92 Va. 794, 23 S. E. 784; *Langford v. State*, 32 Neb. 782, 49 N. W. 766. The subject of misconduct and irregularities of jury fully considered, post, §§ 147-181.

held that merely failing to admonish a jury during a recess of ten minutes, while the jury retired in charge of an officer, did not alone entitle the defendant to a new trial, under the Nevada statute similar to that of California.⁸⁶

§ 59. Permitting jury to separate.

It often occurs that a separation of a jury is an irregularity of the court as well as of the jury; as where, in violation of the prohibition of the statute, the court permitted a jury to separate in a capital case after final submission. Such statutes are merely expository of the common law. The separation of the jury after they were sworn, in felony cases, even during the trial and prior to the final retirement of the jury to deliberate on a verdict, was never permitted prior to legislation on the subject. While statutes generally give courts discretionary power to permit separation during the trial, those of many states forbid it upon final retirement of the jury. Where such statutes are found, a separation of the jury at that stage, with or without leave of court, with or without admonition, with or without the defendant's consent, is a fatal irregularity, entitling the defendant to a new trial, even in the absence of a further showing.⁸⁷ The case is not altered by the return of a sealed verdict, before separation, whether with or without the sanction of the court.⁸⁸

⁸⁶ *State v. Gray*, 19 Nev. 212, 8 Pac. 456; *People v. Colmero*, 23 Cal. 631.

⁸⁷ *People v. Hawley*, 111 Cal. 78, 43 Pac. 404. See, also, *Morrow v. Commissioners*, 21 Kan. 484; *Lester v. Stanley*, 3 Day, 287; *State v. Populus*, 12 La. Ann. 710, 712; *Woods v. State*, 43 Miss. 364; *Wiley v. State*, 1 Swan, 256; *Wesley v. State*, 11 Humph. 502; *Peiffer v. Commonwealth*, 15 Pa. St. 468, 53 Am. Dec. 605; *Cantwell v. State*, 18 Ohio St. 477. But it has been held that, after final submission, the court may permit a separation of the jury for a necessary purpose: *State v. McNeil*, 59 Kan. 599, 53 Pac. 876. It was an abuse of discretion to discharge the jury for sixty-three days on motion of the state, because one of its witnesses was unable to attend, after the jury had been impaneled and the trial had commenced, the nature of the offense being such as to create prejudice in the community from which they were drawn against the defendant: *People v. Dinmore*, 102 Cal. 381, 36 Pac. 661.

⁸⁸ *State v. Bagan*, 18 Wash. 43, 50 Pac. 582; *State v. Mason*, 19 Wash. 84, 52 Pac. 94; *State v. Barkaloo*, 18 Wash. 141, 51 Pac. 350; *Smith v. State*, 40 Fla. 203, 23 South. 834. The subject matter of this section further discussed, *post*, §§ 151-156.

appeared that this statement was made for the purpose of inducing the jury to arrive at a speedy verdict, and that there was no other reason for making it, there might be ground for contending that it showed such improper action as to require the granting of a new trial. But it appeared that this statement was not made for the purpose of influencing the jury in their action, but to inform them that it was the intention of the court to go home at 9 o'clock" etc.⁹²

The circumstances must be peculiar, and the conduct extraordinary to entitle a party to a new trial on account of the deportment of a witness on the witness stand; and yet, a new trial was ordered in one instance of that kind.⁹³ But to constitute irregularity attributable to the court the act complained of must be, even when done by a court officer, committed within the scope of his function and duty as such. And the fact that the sheriff, in the absence of the judge, adjourned the court at 10 A. M. instead of waiting till 12 M., was held not ground for a new trial in a criminal case.⁹⁴

§ 62. As to duty of party to object or call irregularity to the attention of the court.

Another rule generally applicable to irregularities relates to the conduct of the party himself who claims to have been injured by the irregularity alleged. He must show that there has been no delay on his part in seeking a correction of the evil or a removal of its effects; and if this can be accomplished by bringing it to the attention of the court, that should be done at the earliest possible moment.⁹⁵ Failure to do so, as soon as practicable, will be construed as amounting to acquiescence

⁹² State v. Zettler, 15 Wash. 625, 47 Pac. 35.

⁹³ See Chesebrough v. Conover, 59 Hun, 623, 13 N. Y. Supp. 374.

⁹⁴ People v. Shainwold, 51 Cal. 468. Eavesdropping by newspaper reporter during deliberations of jury, no communication being held, not entitled to consideration as ground for new trial: People v. Flack, 9 N. Y. Supp. 279, 10 N. Y. Supp. 475, 8 N. Y. Cr. Rep. 31, 43. The fact that a sheriff and deputy sheriff are sworn as witnesses in a criminal case does not, of itself, disqualify them from acting as bailiffs in charge of the jury during their deliberations: State v. Rosecrans, 9 N. Dak. 163, 82 N. W. 422; Reed v. Commonwealth, 98 Va. 817, 36 S. E. 399.

⁹⁵ See Howard v. People, 27 Colo. 396, 61 Pac. 595, holding that an accused could not complain of the court's allowing the

CHAPTER 5.

IRREGULARITY OF THE JURY.

- § 63. Of the right to jury trial in general.
- § 64. Comparison of statutory and common-law challenges.
- § 65. Application and meaning of constitutional guaranties.
- § 66. Of the offenses within constitutional guaranty.
- § 67. Statutory definitions of bias.
- § 68. Whether assignment of error in ruling on challenge the only method of reaching disqualification.
- § 69. Doctrine of implied waiver in state courts, and diligence required herein.
- § 70. Further as to waiver and concealment—Illustrations from various states.
- § 71. Further as to diligence.
- § 72. Motive for concealment of no importance.
- § 73. Party not prejudiced by failure to exhaust peremptory challenges.
- § 74. What amounts to expression of opinion as to merits.
- § 75. Substitution of juror not summoned.
- § 76. Insanity or severe illness of juror during trial.
- § 77. Exhaustion of juror.
- § 78. With reference to verdicts.
- § 79. Irregularity without prejudice.

§ 63. Of the right to jury trial in general.

The swearing as a juror of one who, for any cause named in the statute, is disqualified, is an error, when done as the act of the court, with full knowledge of the facts. And the action of the court if properly objected to is error to which an exception may be taken, and may avail a party as the basis of a motion for a new trial. Otherwise it is an irregularity, and is attended by varying circumstances calling for the application of various rules of law now to be considered. And unless it be shown in any case proper for a jury trial, that it has been waived, actually or constructively, any judgment rendered as a result of such trial is irregular and should be set aside on motion for new trial, or otherwise.¹

¹ But where a jury trial may be waived, as in a trial for violation of a municipal ordinance, a refusal of the court to allow a

An adequate discussion of irregularities in the formation of the jury, whether involving constitutional or less serious matters, appears impossible without first giving consideration to the principles underlying the right of trial by jury. And, in the first place, it is to be noted that no constitutional provision, guaranteeing, or act of legislation seeking to confer, the right, adds anything to the sanctions of the common law herein; and a question pertaining thereto can only arise when some statute has been passed which has for its purpose or has the effect of an abridgment or infringement of the right, or when same ruling or proceeding of a court, if allowed to stand, would have the effect of depriving a party of such common-law right. As to what statutory provisions do have that effect is a question involving, first, a construction of such statute and secondly, the ascertaining and declaring the true meaning and extent of the common-law right. The performance of this twofold task in various jurisdictions has given rise to a conflict of authority, which it seems impossible to reconcile. Hence the necessity of reproducing some of the arguments made in support of divergent views on vital points. First, however, the fundamental principles of the common law, underlying all such statutes should be examined. Concerning these there should no longer be any dispute. Article 3 of section 2, constitution of the United States provides that, "The trial of all crimes except in cases of impeachment, shall be by jury." The sixth amendment to the federal constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," etc. The word

jury trial is not a fatal irregularity, or error, rendering the judgment void: *In re Fife*, 110 Cal. 8, 42 Pac. 299. Rulings of court on challenges and on evidence offered at trial of challenges, see post, §§ 255-263. It has sometimes been suggested that disqualification of jurors might be considered under the head of misconduct, specified in subdivision 3 of section 1181 of the Penal Code, as one of the grounds for new trial; but it is thought that the terms used and the context make clear the purpose of the legislature to include under that subdivision only misconduct of the jury as a body or of its members sworn and accepted. Prior thereto he cannot misconduct himself as a juror. Nevertheless, it is an irregularity of the jury, that is, in making up the jury.

"jury" in the constitution of the United States unquestionably means such a jury as was required by the common law at the date of the ratification of the constitution; and a jury at that date meant twelve men possessing the necessary qualifications, properly selected, and sworn to try the issues. Both in theory and practice the administration of justice in this country in criminal cases is governed by the same ancient rules of procedure declared by Blackstone, thus: "But the founders of the English law have, with excellent forecast, contrived that no man should be called to answer to the king for any capital crime, unless upon a preparatory accusation of twelve or more of his fellow-subjects—the grand jury; and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterward be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen, and superior to all suspicion." The constitution of California, section 7 of article 1, reads as follows: "The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases not amounting to felony, by the consent of both parties, expressed in open court, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court."

A comparison of the grounds of challenge specified in the statutes of any state with those which existed at common law will seldom disclose any extension of the right of challenge for cause. The right of peremptory challenge, however, is purely statutory. Even the right to challenge for bias, actual and implied, had consideration, and its triers at common law. In all the discussions there has been more concern and more controversy over the subject of bias, or prejudgment, of proposed jurors, than of all others connected with jury trial. This right to challenge for the principal cause, or to the favor, exists independently and irrespectively of the right to exercise peremptory challenges as usually allowed by statutory enactments.²

² Blackstone's Commentaries, 349, 350. See, also, the able opinion of Hawley, C. J., in *State v. McClellan*, 11 Nev. 42-69, and Sac-

§ 64. Comparison of statutory and common-law challenges.

The Code of Civil Procedure of California is fairly representative. Sections 198 and 199 read as follows:

"198. A person is competent to act as juror if he be: 1. A citizen of the United States of the age of twenty-one years, who shall have been a resident of the state one year, and of the county, or city and county, ninety days before being selected and returned; 2. In possession of his natural faculties, and of ordinary intelligence, and not decrepit; 3. Possessed of sufficient knowledge of the English language; 4. Assessed on the last assessment-roll of the county, or city and county, on property belonging to him.

"199. A person is not competent to act as a juror: 1. Who does not possess the qualifications prescribed by the preceding section; or, 2. Who has been convicted of malfeasance in office, or any felony or other high crime."

Additional grounds for challenge for cause are superadded to these in criminal cases:

"Penal Code, section 1071. A challenge for cause may be taken by either party. It is an objection to a particular juror, and is either—1. General—that the juror is disqualified from serving in any case, or, 2. Particular—that he is disqualified from serving in the action on trial.

"1072. General causes of challenge are: 1. A conviction for felony; 2. A want of any of the qualifications prescribed by law to render a person a competent juror; 3. Unsoundness of mind, or such defect in the faculties of the mind or organs of the body as renders him incapable of performing the duties of a juror.

"1073. Particular causes of challenge are of two kinds: 1. For such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias. 2. For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party, which is known in this code as actual bias."

amento etc. Co. v. Showers, 6 Nev. 291, for a learned discussion by Garber, J., of the necessity of a strict observance of the policy of the common law requiring twelve impartial and competent jurors to try civil actions.

A reference to statutes will disclose the various challenges, each of which has received more or less instruction. There are challenges to the array and challenges to individual grand jurors, and like to the entire panel and to the individual trial. But since the disqualification of grand jurors is joinder of issue, such disqualification can only be made by motion to quash or set aside the indictment of all errors and irregularities in the proceeding in the presentation of the indictment, if to whom the same is presented had not, prior to the charge contained therein to the grand jury to answer. And any legal ground of challenge to an individual grand juror, can only be made by a defendant before plea by motion to set aside the indictment.

The Penal Code of California requires challenges to grand jurors to be made before they are sworn, or before the trial of the case, after they are sworn and before the trial is completed.³ The provisions of the Code of Civil Procedure require challenges to precede the swearing of the jury on oath, but by necessary inference, but make no provision for a challenge after the jury is sworn.⁴ The purpose of the statute is to give an opportunity to parties to object to the qualification of persons from serving on trial juries, and to improve, constitutes a waiver of all objections to the qualification of the jury. And full provision is made for the trial of questions relating to qualification. Parties must be diligent in making objections to the qualification of the jury upon voir dire examination of the person proposed to be sworn, and the examination of witnesses. Challenges for cause may be made by the court. The juror challenged and a motion to set aside the indictment may be examined as witnesses on the trial of the question.

Now, turning to Blackstone, the most eminent authority on the common law, we find, in very different arrangement and phraseology it is true, but a

³ *People v. Turner*, 39 Cal. 372; *Territory v. H.*, 14 Pac. 768.

⁴ Cal. Pen. Code, § 1068.

⁵ Cal. Code Civ. Proc., §§ 600-607.

⁶ Cal. Pen. Code, §§ 1078, 1081, 1082; Cal. Code

And in these inducements to suspicion of favor, the question is, whether the juryman is indifferent as he stands unsworn. For a juryman ought to be perfectly impartial to either side; for otherwise his affection will give weight to the evidence of one party, and an honest but weak man may be so much biased as to think he goes by the evidence, when his affections add weight to the evidence. Now, since the writ expect those by whom the truth may best be known, it excludes all those who were apparently partial without any trial, because they are not under the qualifications in the writ, since the truth cannot be known to them. But where the partiality is not apparent, but only suspicious, then the juror is to be tried, whether favorable or not, that is, whether he comes within the description of the writ; and if the triers think he does, then he is to be set aside."⁹

The triers mentioned by Bacon were men chosen from the bystanders or from the vicinage, much as ordinary trial jurors are chosen. Now the challenge is usually tried by the court. Mr. Cooley, in discussing the effect of such a constitutional guarantee says: "Accusations of criminal conduct are tried, at the common law, by jury; and wherever the right to this trial is guaranteed by the constitution, without qualification or restriction, it must be understood as retained in all those cases which were triable by jury at the common law, and with all the common law incidents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused. . . . Many of the incidents of a common-law trial by jury are essential elements of the right. The jury must be indifferent, between the prisoner and the commonwealth; and to secure impartiality, challenges are allowed, not only for cause, but also peremptory, without assigning cause."¹⁰ These expressions have been quoted in cases wherein the right of jury trial was involved in nearly every state and territory in the Union.

§ 65. Application and meaning of constitutional guaranties.

The supreme court of California, has frequently expressed approval of the doctrine, that, jury trial as known at the common law is meant by the guarantee in the California state

⁹ Bacon's Abridgment, 353.

¹⁰ Cooley's Constitutional Limitations, 5th ed., 390, 393.

by the supreme court of Mississippi, in a statute provided that any person who should was impartial should be a competent juror, impression as to the guilt of the accused. It did not cure the error in refusing a new trial for murder, after a showing that a juror who was without bias or prejudice, had stated the defendant was "not justifiable in killing" decree was said also to contemplate an examination that any juror "should be excluded" if the fact that he could not try the case impartially. *Suesser*,¹⁴ it was held that, the provisions of California Penal Code to the contrary notwithstanding, who have an opinion that the defendant would require evidence to remove, are disqualified, what was the source of their knowledge of the fact that the discretion given in applying the paper reports preclude the impartiality of the jury tended to deprive the defendant of the right jury which is in fact unprejudiced.

The opinion of Justice Temple in this case, by the whole court is positive and conclusive without limitation or diminution of the qualifications in California. He said in part that it cannot be had where an unbiased jury cannot be had who has an unqualified opinion that defendant is guilty upon knowledge of material facts of the case, although the common-law qualifications for a juror, as to how that knowledge was obtained, provided for. Indeed the rule went beyond this. A juror is disqualified if he had made positive and unqualified statements in regard to the guilt of the defendant; as the majority of mankind would or could believe the face of such statements made to negate the fact that he could if such statements had not been

¹³ *Jeffries v. State*, 74 Miss. 675, 21 South. 524.

¹⁴ 132 Cal. 631, 64 Pac. 1095. See, also, *Patterson v. State*, 96 Cal. 136, 30 Pac. 1115, where the court said: "the constitution of this state guarantees to all the right to a fair trial by an impartial jury": *Cooley's Constitution*, 390.

human nature. . . . It is true that this test as to whether a proposed juror is impartial, and can try a cause uninfluenced by rumors and newspaper accounts, has been modified, and much is now left to the discretion of the trial court; but it is not intended by this to deprive any one of the right to be tried by a jury which is in fact unprejudiced. No more now than formerly is a defendant compelled to submit his case to a juror who has such an opinion of his guilt as it will require evidence to remove, and thus unjustly add to the burden of his defense."

§ 66. Of the offenses within constitutional guaranty.

In varied phraseology it has been stated by the courts that the common-law right of trial by jury in criminal prosecutions pertains only to common-law offenses. Unfortunately, the authorities have thus far fallen short of definitely classifying, by general rule of uniform operation, the offenses included and those not included. Probably it would be impossible to do so. An attempt closely approximating success was made, however, by the court, per McFarland J., in *Ex parte Wong You Sing*,¹⁵ as follows: "There are, no doubt, some cases which do not come within the constitutional guaranty that 'the right of trial by jury shall be secured to all and remain inviolate.' It has been held to refer generally to the right of the trial by jury as it existed at common law and at the time the constitution was adopted. With respect to the civil, as distinguished from the criminal, law, the right never existed in purely equity cases, or in many other proceedings for the enforcement of private rights. It has been held also not to apply here to certain statutory proceedings not known to the common law. It has also been sometimes, said, in a general way, when the point was not before the court, that it does not apply to a crime created by statute, and which did not exist at common law; but this certainly cannot be taken as a correct general statement of the law. No court would hold, for instance, that a person charged with the statutory crimes of embezzlement, or displacing part of a railroad, which is a felony, could be legally tried without a jury. Modern improvements and changes in society and business have made it necessary to create felonies unknown to the common law; but, if they had existed in the last century, they

¹⁵ 106 Cal. 296, 298, 300, 39 Pac. 627.

certainly would have been triable in England, the general rule at common law prosecutions of all crimes involving loss of liberty were triable by a jury; but parliament (which was provided by various statutes that there should be tried by justices of the peace, without a jury, offenses." And, after quoting the views of Blackstone¹⁶ on the subject, and commenting thus: "From the foregoing it clearly appears that summary proceedings under special statute were not in violation of the common law. But, as they were not at the time of the separation of the American colonies, it is, perhaps, proper to say that the various state constitutions of the right to a jury trial prohibit the legislature from providing for summary proceedings without a jury, in cases of such petty crimes mentioned in said English statutes, or in cases so dealt with are intrinsically of the same nature as those mentioned in said statutes. But the rule should be made much broader. This rule would, in fact, prohibit the legislature to provide for summary proceedings against those violating municipal by-laws, or offenses charged are, in their nature, similar to those mentioned in said English statutes."

§ 67. Statutory definitions of bias.

While the legislature of a state may not abolish the common-law right of trial by jury, it may regulate by statute the exercise of the right. It is a very indefinite term, to explain the meaning of which would be too great a divergence; but it may be said, that the legislature of any state may regulate the procedure, including rules of evidence to the enjoyment and exercise of the right, which will bear to it the same relation as the rules of procedure and practice bear to substantive rights in the most important of such legislation has been the defining and designating what shall and what shall not constitute evidence amounting to sufficient proof of bias.

¹⁶ See Blackstone's Commentaries, 281, 350.

certain relations and facts shall constitute presumption, or implied bias, are common. Among the first of such statutes, was one excluding an opinion as a disqualification, or principal cause for challenge, where the person proposed as a juror declares on oath that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial, and that such previously formed opinion or impression will not bias or influence his verdict, provided the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror. This statute was passed upon as to its constitutionality in *Stokes v. The People*.¹⁷ The province of such statutes and the extent to which the legislature may legislate herein could scarcely be better set forth than in the language of the court in that case, upholding the statute and declaring it constitutional, in the case just mentioned. Grover, J., delivering the opinion, after quoting the provisions of the

¹⁷ 53 N. Y. 164, 13 Am. Rep. 492. In *People v. Powell*, 87 Cal. 348, two ineffectual attempts had been made to obtain a jury in the county of San Mateo where the act of killing had occurred. The change of venue to San Francisco had been ordered on application of the district attorney, under the provisions of section 1033 of the Penal Code, reading as follows: "A criminal action may be removed from the court in which it is pending: . . . 2. On the application of the district attorney, on the ground that from any cause no jury can be obtained for the trial of the defendant in the county where the action is pending." In the San Francisco court the defendant raised the point that the court had no jurisdiction and that said section was unconstitutional. His objection being overruled he was tried, convicted of manslaughter, and sentenced to ten years' imprisonment. On appeal, the supreme court sustained his contention, saying: "Our constitution does not define the right of trial by jury. It was a right then existing, the extent, scope and limitations of which were well understood, and the constitution simply provides that such right shall be secured, and remain inviolate. If the right at common law was as above stated, there can be no question but that an act of the legislature authorizing the trial of a defendant out of the county where the offense is charged to have been committed is an abridgment of the right, and for that reason void." Such statutes have been condemned as unconstitutional in other states: See *Kirk v. State*, 41 Tenn. 344; *Wheeler v. State*, 24 Wis. 52; *Osborn v. State*, 24 Ark. 629; *State v. Howard*, 31 Vt. 414; *Ex parte Rivers*, 40 Ala. 712; *State v. Klapp*, 40 Kan. 148, 19 Pac. 728.

will be seen that the intention of the act was to secure a panel that would impartially hear the case and render a verdict thereon uninfluenced by any considerations whatever. If the person proposed as a juror will do this, the entire purpose is accomplished. The statute requires that he shall make oath that he is impartial, irrespective of any previous or existing opinion. Not that this may be relied upon, on the difficulty of determining, by a person having an opinion, how far he may be unconsciously influenced. The statute goes further, and provides that the juror shall declare that the person proposed as a juror does not have a present opinion as would influence his verdict. Surely this latter provision, if rightly and uniformly administered by a competent court, will afford the accused from injury from a partial jury. But not only this, but the further protection in the challenge for principal cause has been overruled, and challenge for favor, and have this tried and determined by the decision made by the former. The constitution secures the right of trial by jury, and the mode of procuring and impaneling such a jury is left to be regulated by law, either common or statutory, and it is within the power of the legislature to make such changes in the law as it may deem proper, taking care to preserve the right of trial by jury.

A person proposed as a juror in California, in a case where the defendant is charged with murder, is not subject to challenge for implied bias, if he has not expressed an unqualified opinion as to the guilt of the accused. But, in the Penal Code, it has been taken away, and challenge for implied bias, placed in the statute, and a provision inserted that "no person shall be disqualified as a juror by reason of having expressed an opinion upon the matter or cause to be tried by such jury, founded upon public rumor, state papers, newspapers, or common notoriety; provided, that, upon his declaration under oath, or other-

also, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him." In the case of *People v. Ah Lee Doon*,¹⁸ the court disposed of an argument against the constitutionality of the change thus made in a few words, holding that the change did not affect any constitutional right. But, although this case was not mentioned in *People v. Suesser*,¹⁹ its doctrine must be considered as having been fully repudiated by the latter case.

§ 68. Whether assignment of error in ruling on challenge the only method of reaching disqualification.

The question of the remedy for concealed disqualification presents some peculiar phases in California, and therefore warrants special consideration. Preliminarily, it should be stated that the statute governing new trials in criminal cases has always been substantially the same in this respect; that is to say, neither irregularity of the jury nor disqualification of jurors *eo nomine*, has ever been specified as ground for new trial. In the case of *People v. Plummer*,²⁰ the judgment was reversed and a new trial ordered. In the opinion, the provisions of the statute were not referred to; but, it clearly appears from the briefs of appellant's counsel that they claimed to have made a showing within some subdivision of the statute,²¹ and that the court recognized that this was a proper construction of the statute, and that this might be done. It was a case fully illustrative of the question whether in case of concealment of the fact of an emphatic expression of opinion as to the defendant's guilt, in the face of diligent inquiry on voir dire examination, and ignorance of the defendant and of his counsel, fully shown by affidavits, there existed any ground for a new trial, upon a showing by affidavits, there being, of course, no ruling on a challenge or exception. This decision was expressly overruled on this point in *People v. Fair*,²² which was followed in two other cases.²³ In the *Fair* case there was concealment of the

¹⁸ 97 Cal. 171, 180, 31 Pac. 933.

¹⁹ 132 Cal. 631, 64 Pac. 1095, noticed, ante, § 65.

²⁰ 9 Cal. 298.

²¹ Criminal Practice Act, § 440; Wood's Digest, 304.

²² 43 Cal. 137.

²³ *People v. Mortimer*, 46 Cal. 114; *People v. Samuels*, 66 Cal. 99, 4 Pac. 1061.

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in both civil and criminal cases are held to be exclusive of all others; nor can the power of the legislature to exclude all other grounds be doubted, since the right to a new trial is not a constitutional right. But, when that is conceded, still the constitutional question is not answered. There is no material difference between a judgment of conviction or the rendition of a judgment against one based on a verdict rendered by a jury, some components of which are incompetent, or which have prejudged the case, in the absence of knowledge or consent, and such a judgment without the benefit of even the form of a jury trial, except that the peril to the party would be less with a trial by the court, in the entire absence of such a jury. It is true the statute gives the right of challenge—a method of tendering an issue to the adverse party on the qualifications of a proposed juror—but in case of concealed bias or other disqualification, it is absurd to hold that this is an adequate substitute, or any recompense for the constitutional right of which he is deprived. And yet, such is the result of the court's decision in *People v. Fair*, which stands as the adjudicated law at present, in the state of California. It will be observed that the court went further in that case than to say that disqualification of jurors is no ground for a motion for new trial. It said: "The jurors should undoubtedly be indifferent, omni majores exception. But they may not, in fact, be so; and if not, the question is, at what time in the progress of the case, and through what method of procedure, may the prisoner be heard to allege that fact. Undoubtedly, if the fact be known to him, and he make it appear before the juror is sworn, he may interpose a challenge for cause. But, if the prisoner do not know the fact of disqualification, or knowing it, is still unable to establish it before the juror is sworn, what step may he subsequently take to avail himself of the objection? May he make it ground of a motion in arrest of judgment, under section four hundred and forty-two? Certainly not—no one pretends that he could—because the statute itself has undertaken to enumerate the grounds upon which the judgment may be arrested, and the incompetency of a juror not being one of these, the intention to exclude that and all other nonenumerated grounds must be apparent." That a jury trial cannot be entirely waived in felony cases is conceded

courts on either side of the controversy. The question usually arises where after the trial it is shown that one or more of the jurors was disqualified, and the party asking relief from the verdict or judgment has neglected to exercise the right to challenge for cause.

The defendant in a criminal case is entitled to have all the formalities observed that are prescribed by law for the summoning, drawing, and impaneling of the jury, and if any omission or irregularity in that respect occurs, he is entitled to have the same corrected, and if not so corrected upon its being pointed out by the defendant, it is error. But a party will not be permitted to take the chances of a trial before a jury that he knows has not been impaneled in strict conformity to law, and, after an adverse verdict, move to set it aside on account of an irregularity that he can fairly be deemed to have assented to.²⁸ It was held in an early California case that irregularity consisting in the disqualification of a juror, the subject of a challenge could not be made available in the first instance on motion for new trial, the court saying: "The defendants might have examined him on the subject and exercised their right of challenge, before he was sworn, but having failed to do this, they must suffer the consequences of their own neglect."²⁹ In *State v. Powers*,³⁰ the prisoner's counsel had discovered after the return of a verdict of guilty in a capital case that one of the jurors had been, some years before, convicted of a crime involving moral turpitude, and this was held no ground for a new trial. In this case the court, per Waldo, J., reviews the authorities and declares without exception or qualification that the failure to challenge when the juror presents himself to be sworn is a waiver of the objection without reference to the question of knowledge, prior to the verdict of the disqualifica-

²⁸ *People v. Chung Lit*, 17 Cal. 321; *People v. Romero*, 18 Cal. 89; *People v. Roberts*, 6 Cal. 215; *People v. McGungill*, 41 Cal. 430; *Lawrence v. Collier*, 1 Cal. 37; *Territory v. Hart*, 7 Mont. 58, 14 Pac. 768; *Territory v. Harding*, 6 Mont. 326, 12 Pac. 750; *Lum v. State*, 11 Tex. App. 483; *Presbury v. Commonwealth*, 9 Dana, 203; *State v. Elliott*, 45 Iowa, 487; *Benton v. State*, 30 Ark. 340-344; *Irwin v. State*, 29 Ohio St. 190, 23 Am. Rep. 733.

²⁹ *People v. Chung Lit*, 17 Cal. 322.

³⁰ 10 Or. 145, 45 Am. Rep. 138.

learned justice reviews many authorities, federal, state and English, and shows that the conclusion which he reaches was the view entertained at common law as well as under our constitutional systems, and points out the dangers attending a recognition of a contrary rule. In *State v. Marks*,⁸² the court, under a statute similar to that of California, took this view, upon authority of the California cases already cited, but appears to have been unwilling to rest its decision finally and absolutely upon the ground that disqualification of jurors was not specified as one of the grounds for new trial, and saw fit to fortify the decision by calling attention to the fact that it was incumbent upon the defendant to show, by affidavit or otherwise, that the objection was unknown to him or his counsel at the time the jury was impaneled. But some of the courts which hold that there cannot be a waiver by implication, make a distinction between mere arbitrary or statutory, and absolute or natural disqualification. Absolute disqualification as used above, means natural defect, or physical or mental incapacity to fairly and intelligently hear and determine the issues. Its meaning will be readily seen by a glance at the grounds for

and we are bound by them, why look into doubtful decisions of sister states. Nothing has been settled for centuries in England, than that after a juror is once sworn, he cannot be challenged for any pre-existing cause. 1 Inst. 158a, 3 Vin. Abr., E. 11, p. 764, Yelverton Rep. 240, 2 Hawk., c. 43, premises it to be a settled point of practice 'that no juror can be challenged, either by the king or prisoner, without consent, after he has been sworn, unless it be for some cause which happened since he was sworn.' It would be most dangerous to pursue a different practice. It is admitted that if the defendant had knowledge of the objection before the juror was sworn, then he could not after be permitted to take advantage of it. Of this want of knowledge what evidence has the court? The affidavit of a convicted felon—proof always to be had, when deemed necessary. It is said the want of knowledge is an exception to the general rule. This is a mistake. The cause of Watson in Yelverton was this very case, where the exception was discovered after the jury was sworn, and the court declared it within the general rule.''' See, also, *State v. Davis*, 80 N. C. 412; *George v. State*, 39 Miss. 570, 590; *State v. Quarrel*, 2 Bay, 150, 1 Am. Dec. 637; *State v. Fisher*, 2 Nott & McC. 261. But a different doctrine now prevails in Tennessee. See cases presently noted in this section.

⁸² 15 Or. 33, 13 Pac. 614.

challenge, some of which, being ignored, would, according to the views of the courts now under consideration, be a violation of the constitutional principle, guaranteeing the right of trial by jury. For instance, though a juror may not be a resident of the state, or of the United States, or be an ex-convict, he would not for that reason alone, and in the absence of the statute, be incapacitated from fully performing the duties of a juror. A leading case on this subject is *State v. Jackson*.³³ In that case two of the jurors had participated in the Civil War against the federal government, and not having had their disabilities removed, were not electors of the state of Kansas. The court construed this to be a disqualification as jurors under the Kansas statute, and would have been a ground for challenge had one been interposed. But the court reasoned: "As before stated, the fact that said jurors were not electors was not a positive and absolute disqualification to them to serve as jurors, but only a ground for challenge. If it were positive disqualification, then the trial would have been a nullity—precisely the same as though it had been had before ten men only; and if the verdict had been in favor of the defendant, the state might have treated the verdict as no verdict, and put the defendant upon trial again for the defense charged against him. We suppose that no one will claim that this could be done. The fact that said two jurors were not electors could not have prejudiced any of the substantial rights of the defendant. Undoubtedly they tried the case as fairly and impartially as though they had been electors. If the disqualification of the jurors had been such as would have prejudiced any of the substantial rights of the defendant it might be the defendant would have a right to a new trial because of such disqualification." The court here intimates that a bona fide attempt to ascertain the statutory disqualification might avoid the implied waiver. This is saying in another form, what has been so often decided, that diligence must be shown, or that the irregularity occurred in spite of reasonable diligence.

According to these decisions no statute or court can sanction or validate an implied waiver of an irregularity of such serious import as to substantially deprive the party of a trial by a constitutional or common-law jury of twelve men. And, from this,

³³ 27 Kan. 581, 41 Am. Rep. 424.

the argument proceeds thus: A trial before a juror who has a confirmed bias violates the spirit of the constitutional guaranty; and a trial before an imbecile violates its letter as well as its spirit. There is positive peril to the party against whom the prejudice exists in the mind of the juror, and there is potential peril where the powers of perception and discrimination are absent from the jury, or from a part of it. This was well expressed by Justice Douglas in a case of bias, as follows: "It would be difficult for anyone, in the fullness and freshness of our language, to select or invent forms of expression which would more clearly and emphatically convey a firm conviction of guilt, and at the same time preclude all hope or possibility of escape on the part of the prisoner. They furnish a strong case, and bring it fully within the authorities cited, and hence establish the incompetency of the juror. Can it be insisted that the juror was impartial; that he possessed that moral perception, that sense of justice, the integrity of character which would qualify him to pass upon the life of a fellow-citizen? It presents the revolting spectacle of a deep-seated malice, concealed under the sacred garb of friendship, destroying its victim by adding treachery to perjury. It is wholly immaterial for the purposes of this motion, whether the prisoner be guilty or innocent; law, justice, humanity, forbid that he should be deprived of his life by such means, and by a jury thus constituted."⁸⁴ In *McLain v. State*,⁸⁵ the court said in the course of the opinion: "A trial before a prejudiced jury, or composed of men who had already prejudged the case, is a mere mockery of justice." And later, in the same state, it was held that a mere arbitrary disqualification, in that instance, having served on another jury within two years, the juror having stated on his voir dire that he had not served, was ground for a new trial.⁸⁶ That a distinction is made by the Texas court between arbitrary and natural or actual disqualification is seen by a glance at recent decisions. In one case,⁸⁷ it was held

⁸⁴ *Sellers v. People*, 3 Scam. (Ill.) 412.

⁸⁵ 10 Yerg. (Tenn.) 241, 31 Am. Dec. 573.

⁸⁶ *Endowment Rank etc. v. Steele*, 107 Tenn. 1, 63 S. W. 1126.

⁸⁷ *Mays v. State*, 36 Tex. Cr. Rep. 437, 37 S. W. 721. The same view prevails in West Virginia: *Beck v. Thompson*, 31 W. Va. 459, 13 Am. St. Rep. 870, 7 S. E. 447.

be tried, if it appear that such opinion as the mind of the juror." In the opinion constitution of the United States provides shall be allowed an "impartial trial by a by appellant that the juror Douglas had before the trial, which would have dis- veing a jurymen in the cause, and been allenge for cause, had he known the true however, shown that the juror testified he had, at the time he was so examined, s previous statements; that he had no idice toward the defendant." And after discussing principles the court continued: principles, and others consulted in this opinion that Henry Douglas was not a ial juror; and as to the question whether duties in calling said juror and examin- not, we express no opinion, but conclude wing in the cause, the juror did not show jurymen as is contemplated by the law. the judgment and remand the cause for

y, where the statutes governing new trials rts to specified grounds, a case came be- art presenting the following interesting case, a juror in his voir dire stated that fied opinion of defendant's guilt or inno- such as would control him in arriving at he had no prejudice against defendant. s shown that prior to the trial the juror t that "there are so many married men s characters, and single men will get the best of them, and their husbands will he didn't believe in it; and that from nd read about the case, he was satisfied guilty. It appeared that defendant did until after the trial. It was held that ified, and that the showing was sufficient nt to a new trial.⁴⁸ This question does

y (Ariz.), 32 Pac. 166.

defendant was "not justified in killing" the deceased; that he had been fully examined on voir dire, and had stated under oath that he was without bias or prejudice, and that the statement was not known to counsel until after rendition of the verdict.⁴⁸ In the federal courts, where there are no statutory restrictions or limitations upon the exercise of the jurisdiction, new trials are freely granted for this cause. Thus, where in a case on conflicting and voluminous testimony, it appeared that one of the jurors had prejudged the case, and concealed that fact from the defeated party, it was held a new trial should be granted.⁴⁹ And it appears to be well established that new trial is a permissible remedy in such cases in Illinois,⁵⁰ Georgia,⁵¹ Arkansas,⁵² Louisiana,⁵³ and Vermont.⁵⁴

§ 71. Further as to diligence.

Of course in states where concealed disqualification of a juror is no ground for new trial there is, in this connection no question as to diligence or the lack of it. And where the more lenient, or "minority" view prevails, there are naturally some divergencies as to what constitutes a sufficient showing of diligence in order to avoid the implication of waiver of the disqualification. But, generally, it may be stated that the law imposes upon the parties to an action the duty of making strict inquiry into the qualifications of those summoned as jurors, and imputes to them knowledge of any of the disqualifications specified in the statute; and such presumption continues until

⁴⁸ *Jeffries v. State*, 74 Miss. 675, 21 South. 526. See *George v. State*, 39 Miss. 591, also case of bias.

⁴⁹ *Hyman v. Eames*, 41 Fed. 676. See, also, *United States v. Christensen*, 7 Utah, 26, 24 Pac. 618; *Chartz v. Territory (Ariz.)*, 32 Pac. 166.

⁵⁰ *Byers v. Mt. Vernon*, 77 Ill. 470. See, also, *West Chicago St. Ry. Co. v. Hubnke*, 82 Ill. App. 404, holding concealed prejudice against counsel for losing party warranted a new trial.

⁵¹ See *Myers v. State*, 97 Ga. 76, 25 S. E. 252; *Mize v. Americus Mfg. etc. Co.*, 109 Ga. 359, 34 S. E. 583.

⁵² *Meyer v. State*, 19 Ark. 163.

⁵³ *State v. Whiteside*, 49 La. Ann. 352, 21 South. 340; *State v. Giron*, 52 La. Ann. 491, 26 South. 985; *State v. Harper*, 51 La. Ann. 163, 72 Am. St. Rep. 454, 24 South. 796.

⁵⁴ *Richards v. Moore*, 60 Vt. 449, 15 Atl. 119.

the contrary is made to clearly appear, together with a showing to the satisfaction of the court that the want of knowledge exists in spite of the use of reasonable diligence to acquire knowledge of the facts bearing on the question.⁵⁵ Whether the standard of diligence varies in different cases, or the acts required to reach such standard vary, is immaterial. The courts have in particular cases, or particular groups of cases, decided what did, in view of the environment, constitute diligence, sufficient to meet the imputation of prior knowledge and the implication of waiver, and what omissions were fatal to the showing of diligence.⁵⁶

In *Faville v. Shehan*,⁵⁷ where one of the jurors trying the cause was a nonresident of the state, and the fact was not known until after the verdict, the appellate court, in affirming the order, said: "Neither party knew that the juror was not an elector of the state, and he was not examined upon this point as to his qualifications. We think the rule is well settled that when a party in a civil case accepts a juror without examination as to his qualifications, he waives objections on account of want of qualifications of the juror, discovered afterward." And in *Wassum v. Feeney*,⁵⁸ the court said: "The juror in

⁵⁵ *Glover v. Woolsey*, Dud. (Ga.) 59; *Ready v. Manchester Gaslight Co.*, 67 N. H. 147, 68 Am. St. Rep. 642, 36 Atl. 878; *Buck v. Hughes*, 127 Ind. 46, 26 N. E. 558. Where, however, more than three years had elapsed between the first and the second trial, and only one of the counsel present at the first trial was present at the second, it was held that this was a sufficient rebuttal of the presumption: *Williams v. McGrade*, 18 Minn. 87.

⁵⁶ For requirements as to diligence, see, generally, *Moore v. Farmers' etc. Assn.*, 107 Ga. 199, 33 S. E. 65; *Kinneberg v. Kinneberg*, 8 N. Dak. 311, 79 N. W. 337, a case of misconduct of jury; *Mew v. Railway Co.*, 55 S. C. 90, 32 S. E. 828.

Silence of Juror.—Where a juror remained silent as to a relationship existing with the plaintiff when questioned on his voir dire, and the defendant believing such silence meant that there was no relationship, failed to discover the fact until after the trial, when it first came to his knowledge, it was held that there was no negligence in failing to discover such fact and that it was error to refuse a new trial therefor: *Texas & P. Ry. Co. v. Elliott*, 22 Tex. Civ. App. 31, 54 S. W. 410.

⁵⁷ 68 Iowa, 244, 26 N. W. 133. To same effect, *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20, 26 S. W. 712.

⁵⁸ 121 Mass. 93, 23 Am. Rep. 258.

question being under twenty-one years of age, was not qualified as the statutes require. But his name being upon the list of jurors returned and impaneled the defendant had the opportunity by proper inquiry, of ascertaining any grounds of objection to him, and might have challenged him before the trial began. When a party has had an opportunity to challenge, no disqualification of a juror entitles him to a new trial after the verdict."

In *Craig v. Elliot*,⁵⁹ where one of the jurors had been on a former jury in a trial between the same parties, urged as ground for a new trial, the court said: "With respect to the third ground for a new trial, it need only be remarked that although one of the jurors of the former jury appears to have been upon the latter jury also, for aught that appears upon the second, the appellant may have known the fact before the latter jury was sworn, and if so he should have made his objection by challenge, but having failed to do so, a new trial for that cause ought not to be awarded." And the party must use the means provided by law for ascertaining the qualifications of jurors, and if he fail to do so, he is not entitled to a new trial on account of the bias of a juror, although ignorant of its existence until after the trial.⁶⁰

The ignorance of the party as to the existence of the disqualifying fact, until after the trial must be clearly shown,⁶¹ and not only that, but it must also be shown that his counsel had no knowledge on the subject.⁶² The whole question of imputed knowledge of disqualifying facts, and of diligence required, may be thus epitomized: To entitle a party as of right to a new trial on the ground of concealed disqualification of a juror, he must show affirmatively, (1) the fact of such disqualification; (2) that it was unknown to himself or his counsel until after verdict; (3) that the juror was questioned as to that particular subject on his voir dire, and answered falsely.

⁵⁹ 4 Bibb (Ky.), 272. To same effect, *Fitzpatrick v. Harris*, 16 B. Mon. (Ky.) 563.

⁶⁰ *State v. Robertson*, 54 S. C. 147, 31 S. E. 868.

⁶¹ *State v. Ready*, 44 Kan. 697, 700, 26 Pac. 58; *Grottkan v. State*, 70 Wis. 462, 36 N. W. 31.

⁶² *Edmondson v. Wallace*, 20 Ga. 663; *State v. Nash*, 45 La. Ann. 1137, 13 South. 732, 734.

§ 73. Party not prejudiced by failure to exhaust peremptory challenges.

It is a rule, where error in ruling on a challenge is relied upon as ground for a new trial or reversal, that, in order that the exception may avail the party, he must resort to a peremptory challenge to get rid of the juror thus unsuccessfully challenged, and it must also appear that all his peremptory challenges were exhausted before the jury was completed. This is required in order to avoid the implication of waiver of the error.⁶⁷ But, in the absence of authority on the point, it is suggested that the reason for this rule is absent in case of concealed disqualification. There can be no waiver in the absence of knowledge, or, at least, of presumptive knowledge.

§ 74. What amounts to expression of opinion as to merits.

The question of what amounts to sufficient proof of disqualification, is one of evidence, elsewhere considered at some length.⁶⁸ It has been already pointed out, however, that in some states there are statutes which exercise a controlling influence as to the proof,⁶⁹ and in several preceding sections facts held to constitute expressions of definite opinions on the merits of illustrative cases have been necessarily stated.

§ 75. Substitution of juror not summoned.

Where some prejudice, actual or inferential, must appear, to entitle the party to a new trial, or reversal, as in California and in all states where it is provided by statute that objections to the array, or panel, must be taken before the jurors are sworn, the placing of a person on the jury through mistake or oversight of the juror, or so permitting it to be done, while an irregularity, yet would be no ground for a new trial.⁷⁰ New trials have been frequently granted, however, in Pennsylvania for that cause.⁷¹ But, it would seem that where a

⁶⁷ See post, §§ 677, 672, 675.

⁶⁸ See post, §§ 406-411.

⁶⁹ See ante, § 70.

⁷⁰ See *Tolbert v. State*, 71 Miss. 179, 42 Am. St. Rep. 454, 14 South. 462; *Burns v. State*, 80 Ga. 544, 7 S. E. 38.

⁷¹ See *Jejorek v. Borough of Nanticoke*, 9 Kulp (Pa.), 501; *Heiter v. Kaufman*, 20 Pa. Co. Ct. Rep. 198; *First Nat. Bank v. Ahlers*, 20 Pa. Co. Ct. Rep. 505; *Commonwealth v. Batuvin*, 24 Pa. Co. Ct. Rep. 181.

extreme case" than that of one or more jurors going on the jury with a settled bias. A party has, at least, an equal chance with an insane juror or one disabled or distracted by reason of illness, but he usually has no chance with one who has prejudged his case and concealed it for the purpose, usually, of serving on the particular jury.

This ground for a new trial might, upon first impression, appear to be a more proper subject for consideration under the head of accident; but, that term, in legal sense, has special relation to parties, while whatever intervenes to affect the conduct or condition of the jury, so as to interfere with their proper and intelligent performance of the duties assigned to them, constitutes simply an irregularity.

§ 77. Exhaustion of juror.

It was held in one case that where it appeared that a verdict of guilty of murder in the first degree was obtained through physical exhaustion of a juror, who indicated that the verdict was not of his conscience, the court should grant a new trial.⁷⁵ But the abuses to which a recognition of that as a ground for new trial would lead obviously forbids the adoption of any general rule in harmony with that decision.⁷⁶

§ 78. With reference to verdicts.

Mere informalities of verdicts, which are subject to clerical correction under the direction of the court, are not referable to this head; but those of more serious import, in case they are not corrected by the court in the exercise of its power herein become irregularities of the court.⁷⁷ If the defect inheres in the verdict, the meaning of which expression is elsewhere explained, it usually becomes a verdict against law.⁷⁸ But aside from defects apparent upon the face of the verdict, or as compared with the issues, there may be an irregularity, or depart-

⁷⁵ *Commonwealth v. Lutz*, 10 Kulp (Pa.), 231.

⁷⁶ See *State v. Griffin*, 71 Iowa, 372, 32 N. W. 447, where it was held that a new trial should not be granted because a sick juror assented to a verdict, not because he was convinced by the evidence of the guilt of the defendant, but because of his desire, owing to his sickness, to be released from the juryroom.

⁷⁷ See ante, chapter 4.

⁷⁸ See post, §§ 250-254.

are from statutory or established procedure in the manner of returning the verdict which is an irregularity of the jury. For instance, a jury cannot return a sealed verdict in a criminal case, even under the court's direction, and if that course is adopted, a new trial should be granted.⁷⁹ Primarily, this would be an irregularity of the court; but it is also an irregularity of the jury, in proof of which it is only necessary to suppose a case in which it is done without sanction of the court.

A defective verdict can only be amended by the jury under direction of the court. Where in an action of claim and delivery the jury, in rendering a verdict for the plaintiff, failed to find the value of the property, it was held that it was not helped by the fact that the phonographic reporter noted in his report of the proceedings in the case "that the jury retired, and subsequently returned into court with a verdict in favor of plaintiff, fixing the value of the property at five hundred dollars." In delivering the opinion the court said: "The judgment is also erroneous, because it is founded upon an informal and incomplete verdict. The verdict was informal and insufficient in that it did not find the value of the property. . . . The court had the power to have it corrected; for the law made it his duty to call the attention of the jury to the fact that their verdict was insufficient, and to advise them in what it needed to be corrected. The correction could then have been made by the jury in the presence of the court, or they could have retired to further consider their verdict and put it in proper form. That was not done; and the court, in accepting the verdict in its defective form and pronouncing judgment upon it, assumed as a fact what the verdict did not express, and, in doing so, invaded the province of the jury; for the jury alone could find the value of the property."⁸⁰

§ 79. Irregularity without prejudice.

It is obvious that an irregularity, whether or not within the purview of the statute, which upon its face is harmless, affords

⁷⁹ *State v. Anderson*, 41 Minn. 104, 42 N. W. 786.

⁸⁰ *Stewart v. Taylor*, 68 Cal. 5, 6, 8 Pac. 605. Citing, *Gorlick v. Bower*, 62 Cal. 65; *Vanderford v. Foster*, 62 Cal. 179. See, also, *Deagberry v. Haggin*, 56 Cal. 522; *Kelly v. McKibben*, 54 Cal. 182, holding that a verdict, to be the basis for a judgment, must be complete and certain.

no justification for setting aside the verdict and granting a new trial.

The misdescription of the names of some of the jurors summoned to try the cause in the return upon the venire is not ground for a new trial or for arresting a judgment. And a mere dissimilarity of names, which may rest wholly upon a clerical or typographical error, without any showing that all the jurors who sat at the trial were not actually summoned, is not ground for reversal of a judgment of conviction.⁸¹ And it was held a case of harmless irregularity, where a juror had an officer to write out the verdict for the jury after the jury had agreed upon a verdict of guilty. It was an irregularity—a disclosure of the verdict before its return; but without evil intent and without prejudice to the defendant.⁸² On the same principle it was held no ground for a new trial that, on a trial of a juror for actual bias, one of the triers appointed was on the panel of the jury in attendance in the case.⁸³ So where the finding of the jury is merely advisory, disqualification of jurors is no ground for new trial.⁸⁴ And it was held no ground for reversal where the sworn officer in charge of a retired and deliberating jury was relieved by another bailiff duly sworn by the clerk in the court's absence, there being no evidence that the jury were subjected to any outside influence.⁸⁵

For the same reason of trivial character of the irregularity it is held, even in the absence of statutes requiring the objection to be made before the swearing of the jury, that a new trial will not be granted for an irregularity in drawing jurors, where the defeated party is not shown to have been prejudiced thereby.⁸⁶

⁸¹ *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362.

⁸² *Territory v. Edie*, 7 N. Mex. 183, 34 Pac. 46.

⁸³ *People v. Voll*, 43 Cal. 166.

⁸⁴ *Sheets v. Bray*, 125 Ind. 33, 24 N. E. 357.

⁸⁵ *Nicholson v. State*, 38 Fla. 99, 20 South. 818.

⁸⁶ *Sprague v. Brown*, 21 B. L. 329, 43 Atl. 636; *Hargrove v. State* (Tex. Cr. App.), 50 S. W. 1016.

CHAPTER 6.

IRREGULARITY OF THE ADVERSE PAR

- § 80. General principles.
- § 81. Unfair conduct to gain advantage in selection.
- § 82. Undue intimacy between party and juror.
- § 83. Treating jurors.
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- § 94. Improper conduct in examining and cross-examining.
- § 95. Interested officer in charge of jury.
- § 96. Tampering with, and keeping from the trial witnesses.
- § 97. Suppressing and concealing evidence.
- § 98. Knowingly introducing false testimony.
- § 99. Misleading party to his prejudice.
- § 100. Fraud practiced in matter of presenting points.
- § 101. Of duty of counsel to call matter to court's attention.
- § 102. Counsel must except to improper conduct.

§ 80. General principles.

Various acts of parties, their counsel and others have been held to constitute what is almost invariably the decisions "misconduct," the statutory name of error, is "irregularity." It might be difficult to even to classify all of such irregularities. Nearly all are considered with reference to the effect they have on the verdict. A few may affect the decision when made by the court without a jury.

Misconduct, which would entitle a party to a new trial if tried by a jury, is often of no importance, as bearing on the result, where the trial is by the court without a jury. For instance, a statement of defendant's counsel to a witness at the trial, to the effect that he had committed "rank perjury," in another case between virtually the same parties in the same court, was held not to entitle the adverse party to a new trial, the trial being by the court without a jury.¹

No distinction is made in statutes, nor was any made at common law between misconduct and irregularity of parties when presented in the form of a ground for new trial, nor is there any reason why there should be any. The law does not look so much to the manner of preventing a "fair and impartial trial," as to the fact that it has been prevented. "Irregularity" is the statutory term used. It includes wrong conduct. All misconduct is irregular; but there may be an irregularity of a party or his attorney, without a wrongful act. For instance, where a remark was dropped by the district attorney in the presence of the bailiff, without intending that it should be communicated to the jury, but which was nevertheless communicated, it was held ground for reversal and new trial, being calculated to prejudice the jury.² In such case the innocence of intent is not a satisfactory answer where a party complains and shows a probability that the verdict might have been influenced to some extent by the act of his adversary.

"Irregularity on the part of the party charged, or of the jury, must be satisfactorily proved in order to lay the foundation for the interposition of the court; but, when the irregular conduct is established, it is not necessary that it should certainly appear that it influenced the jury. In that state of the case it is sufficient that the irregularity appears to be of a character that it might have affected the impartiality of the

¹ See *Spiro v. Nitkin*, 72 Conn. 202, 44 Atl. 13.

² *Brown v. State*, 69 Miss. 398, 10 South. 579. See, also, *Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98, where new trial ordered, though no intention to act improperly apparent and no showing of actual influence on the verdict; *Gilley v. Bartlett*, 19 N. H. 324, where the defendant, in the presence and hearing of several jurors, declared that the testimony of a certain witness for plaintiff was false, although the defendant did not know that jurors were present, and a new trial was granted.

form as to good or bad faith, can never be known as their verdict indicates. If anything is to be inferred from the verdict, as to their conclusion, the most reasonable inference is that they attributed to counsel good faith. Upon this line of reasoning, the better the motive, the greater reason for setting aside the verdict. If the courts are striving to ascertain whether the district attorney thought he was acting in the strict line of his duty, the defendant though perhaps innocent may be sentenced to long term of imprisonment, or may be in the gallows, as a result, not of what the district attorney did or said, but of what he actually did or said.

Some of the decisions, are to the effect that with reference to the nature of the acts constituting the attempt to influence the jury, the mere fact appearing

lacking to the point, we are prepared to say that such an act on the part of the prosecuting officer might be found to be an act of his opening statement to the jury as to the facts of the case, even absolutely demand in the interests of justice, of the defendant. The principle justifying such a finding is outlined in *People v. Wells*, 100 Cal. 459, 34 Pac. 107. It shows a portion of the opinion in which the court applied excessive stress upon the question of good or bad faith of the prosecuting officer, as follows: "There is a new trial granted because of the action of the district attorney in maintaining questions of various witnesses, the answers to which were not being admitted by the court. The conclusion of the court was declared because it was evident from the record that the district attorney in asking those questions was acting in bad faith, tempting in this course to improperly influence the jury in favor of the defendant's damage. That case is an exceptional one, but not in its law, and the decision is eminently correct. If no misconduct existed here the same results would follow. It is not at all apparent that the district attorney was acting in bad faith in making the statements to which objection is made. It is not even clearly apparent that his position as to the admissibility of such evidence was wrong in law. As a circumstance showing the guilt of the defendant upon the charge, the facts evidencing his conduct in this regard bore no weight. There is certainly no such palpable wrong as to justify the conclusion that he was actuated by bad faith in making the statements here under consideration."

tempt was made warrants the granting of a new trial.⁷ Others, going to the other extreme, are to the effect that the party alleging the attempt must, without regard to the nature of the act constituting the attempt, show, in addition, that the attempt resulted in some injury or prejudice.⁸ Neither of these propositions is correct. On the one hand, no mere act of a party evidencing an intention to unfairly influence the jury will justify a court in setting aside a verdict in favor of his adversary, unless the act done was calculated to have that effect. On the other hand the court should look at probabilities alone. It rarely is the case that any actual injury or prejudice can be shown. All that courts can require of the losing party—all that is required, and it is so held, in a majority of well-considered cases—is that some act or conduct of the successful party be shown which might have influenced one or more jurors in his favor. And where such act is shown the intention of the of-

⁷ The virtuous indignation of judges, sitting in review, has sometimes led to verbal excesses in passing upon the reprehensible conduct of parties. The same judges would perhaps be among the first to reject all rhetorical excesses if employed in passing on other questions. In some instances it has appeared as if the mere punishment of the offending party were a sufficient reason for granting a new trial. Thus, in a case where, previous to the trial, the party in whose favor the verdict was afterward rendered, sought the society of a juror, and sought to impress his mind with the justice of his claim, the court, in deciding that this was sufficient cause for setting aside the verdict, said: "It is insisted that the juror was not in fact influenced, and that justice has been done between the parties. It may be so; but it may be useful to the party to learn that a good cause may be injured, but cannot be promoted, by conduct of this sort, and to the public generally to know that it will be tolerated in no case whatever": *Cottle v. Cottle*, 6 Greenl. 140.

⁸ *Kinna v. Horn*, 1 Mont. 597. Affirmed in *Higley v. Gilmer*, 3 Mont. 438. In this case the court affirmed the doctrine of the first case and said: "It was held [referring to *Kinna v. Horn*] that it did not appear that the irregularities affected the verdict of the jury; that this court, in the absence of proof thereof, could not presume that they had any effect thereon; and that the refusal of the judge who tried the cause to grant the motion for a new trial upon this ground could not be deemed an abuse of discretion." See, also, *Holman v. Baynesford*, 3 Kan. App. 676, 44 Pac. 910.

fending party is immaterial.⁹ And it is sufficient proper act be calculated to influence any one of the j

⁹ *Preston v. Mutual Life Ins. Co. (C. C.)*, 17 Fed. 46 case the action was upon a life insurance policy, which a warranty that the insured would not die by his own sane or insane. It appeared that insured came to his drowning. Defendant put in evidence a writing found on, clearly indicating an intention to commit suicide. counsel claimed that this paper was written long before death, and that he afterward recovered from the suicide. And in his argument to the jury he stated for the first the paper bore evidence that it was written long before death; and he then produced a magnifying glass, by which it was claimed there could be read upon the paper of a person with whom the insured had sojourned some time. Held, that this name was not in evidence, and, as he had no opportunity to offer anything in explanation the use made of it must be considered as unfair, and a new trial be granted, although no objection was taken at the time. Also held that a verdict in favor of a party whose conduct calculated to improperly influence the jury upon a matter should be set aside, and a new trial granted, on the public policy, though such party may not have intended improperly. In the opinion the court said: "While I do not think there was intentional wrong or misconduct, I do think the declaration, the argument, and the production of the glass, at such a stage of the proceeding, rendered the trial unfair, and that the declaration and argument must be set aside as prejudicial to the defendant. The defendant had no opportunity to make an issue, as he well might, whether there was such a name there, and, if so, whether it was the name of C. W. White, or the handwriting of the deceased. He had no opportunity to answer in any way by evidence or argument. It appears from the evidence that the note to the family and the name of Deceased were in the handwriting of the deceased, but there was no evidence as to the character of the writing alleged to have been read through the magnifying glass. It is a familiar rule that a party must not, in argument, refer to matter not in evidence to the prejudice of the adverse party, and that failure to object to such a reference is just ground for a new trial. The name to which the reference was made was not in evidence, in any proper sense, and the argument thereon must be treated as so far as it tends to entitle the defendant to a new trial. It is no sufficient ground in this case to say that the objection should have been made at the time, for it often happens that harm of this character cannot be cured. The failure to object deprives the defendant of the right of exception, but it does not re-

court of its obligation to see that the parties have a fair trial. The proprieties of the administration of justice do not countenance a line of conduct which presents one side of a material question to a jury, which is to determine such question, and it is plain and unquestionable that a verdict in favor of a party whose conduct was calculated to improperly influence the jury upon a material question should be set aside, and a new trial granted on the ground of public policy, though the party may not have intended to act improperly."

¹⁰ *Palmer v. Utah N. Ry. Co.*, 2 Idaho, 315, 13 Pac. 425, 2 Idaho, 352, 16 Pac. 553. See, also, *Bradshaw v. Degenhart*, 15 Mont. 267, 272, 48 Am. St. Rep. 677, 39 Pac. 90; *Sacramento etc. Co. v. Showers*, 6 Nev. 291. In *Railroad Co. v. Porter*, 32 Ohio St. 328, there is a clear intimation that intention of the party treating jurors is material. In *Phillipsburg Bank v. Fulmer*, 31 N. J. L. 52, 86 Am. Dec. 193, the court said: "Considering the great importance of jealously guarding the jury against improper influences, and the reason there is to fear that the practice of thus endeavoring to procure a favorable verdict is becoming more and more prevalent and dangerous, enough suspicion has been thrown on the conduct of the defendant and his sons to make it our duty to interfere. It does not distinctly appear that there were private conversations with jurors on the subject of the cause; but it does appear that unusual civilities and attentions were paid to several of them, and they were treated more than once, and in such a manner as to render it in the highest degree probable that it was not done inadvertently and only so far as was called for by the ordinary proprieties of life, but for the express purpose of influencing the verdict. There is no danger that we shall err in requiring of the parties the most scrupulous care to avoid even the appearance of adopting undue means of insuring success." In the above case, from 6 Nev., Justice Garber, in delivering the opinion, learnedly reviewed and criticised numerous authorities bearing upon the test of design or inadvertence in improper acts of successful parties, and dissented from those holding the motive material in the following language: "But however this may be, we prefer to follow the plain, simple rule of the common law. The rule, it is said, was adopted 'to prevent the jury from being tempted to find a verdict against their unbiased sense of the right of the case, by motives of gratitude or of feeling for favors, however slight, conferred by either of the parties,' and therefore the rule applies to any treating, of any of the jury, at any time after they are sworn, and before they agree upon their verdict, whether once or several times, by design or inadvertently, in the presence of the officer or in his absence, and whether we might deem it called or uncalled for by the proprieties of life. And there is no hardship or undue severity in this rule. If the prevailing party is put to the expense and vexation of a New Trial, Vol. I—10

All that is required is that some reason be shown for supposing that a fair trial was prevented.¹¹ the court said: "We cannot be too strict by jury from improper influences. This to give due confidence to parties in the trial and everyone ought to know that for a judge to intermeddling with jurors, a verdict will be ever, may be considered as a use of the power to mean an act calculated to bias or mislead."

In passing upon the question of probable cause, the court proceeded to the superior knowledge of the jury. In termination, the latter considers not only the facts of the case, but the party and the nature of his act, but the jury or jurors involved.

It is sometimes difficult to determine, in the conduct of parties and their attorneys with respect to whether to press the motion for new trial on the ground of irregularity of the adverse party or misconduct. It has been said, that this difficulty arises from the success in influencing the jury, since such success necessarily implies misconduct of the jury. But proof of success requires proof of effect.

On a second trial, he can blame no one but himself. He is joined upon him to refrain from intermeddling. He is to keep aloof from them during the progress of the trial, that his attorneys and agents do the same. He is to keep which of the proprieties of life would have been observed if the defendant has so conducted—had suffered from it. He drank the liquor to pay for it? If this was the case, it should be considered designed? But we do not to enter into these nice distinctions, involving the jury to be decided, if at all, each upon its own conscience. In the absence of any known guiding principle of law, the jury is left to its own discretion. If treating by design, it would be long before it could arise in which the designing party would be successful. It is at least some plausible excuse for his act, that he was only inadvertent, or called for by the ordinary course of life. He criticised and disapproved the intimate case that if the treating were done inadvertently, it would be fatal to the verdict.

¹¹ Morgan v. Hugg, 5 Cal. 409.

¹² 125 Cal. 517, 521, 58 Pac. 87, citing Mass. 218.

selection of the jury, the verdict was set aside and a new trial ordered.¹⁶ In cases of mere suggestion to the sheriff of names of persons by a party, nothing further appearing, and where that is the only ground assigned for a new trial, the motion has been usually denied.¹⁷ In such cases, unless suspicious circumstances are present, there should be no presumption of any bias on the part of the juror. There is no attempt apparent to influence a juror. The conduct of the party is as consistent with a desire to obtain competent and fair jurors as with any sinister motive. Still if other circumstances should appear—for in-

¹⁶ *Boyce v. Ambuchon*, 34 Mo. App. 315. The Missouri statute disqualifies all persons summoned as witnesses in a civil action from service on the jury in the same cause. In this case the court said: "In view of this last section, we cannot put the trial court in the wrong for excusing from the panel the ten jurors who had been summoned as witnesses. It is true that the trial was in a county where neither of the parties resided, and not in the county wherein the supposed grievance sought to be redressed occurred. It is also true that jurors summoned from the vicinage were not likely to know anything touching the matters in controversy. But, conceding all this, the court was bound to assume that its own sworn officers were acting in good faith. But when it conclusively appeared (as it did before the close of the trial) that the summoning of these jurors was a mere device and trick to increase plaintiff's peremptory challenges from three to thirteen, that not even an attempt was made to examine any of the jurors thus summoned as witnesses, and that not even an excuse was offered for the flagrant abuse of the process of the court, it became its duty to vacate a verdict obtained by the party guilty of the abuse, upon motion of the adversary party at once. To avoid any possible recurrence of a similar proceeding, we feel bound to say that, if the trial had been conducted in an unexceptional manner in all other respects, even if the verdict was unquestionably for the right party under the evidence, we would not hesitate to vacate it at once upon this ground alone."

¹⁷ See *Park v. Harrison*, 8 Humph. (Tenn.) 412; *Quinebang Bank v. Tarbox*, 20 Conn. 510. In these cases, however, the circumstances were such as to practically rebut prejudice. It is obvious, however, that the selection by an officer of any of the jurors, in consequence of the nomination, appointment, or request of a party, or his counsel, is itself reprehensible conduct, both on the part of the party and officer, and should usually warrant a new trial if not fully explained. In *May v. Ham*, 10 Kan. 600, the court said: "The judgment in this case must be reversed and a new trial granted for misconduct of the plaintiffs below (defendants in error). Some time

stance, undue intimacy between the juror and the party suggesting him—and it should be shown that the facts were not known until after the trial, the losing party might be entitled to a new trial.¹⁸

before the trial of the cause all the regular jurors were excused by the court but six. The court then ordered that the sheriff summon twelve additional jurors for the term. Soon after this, J. A. Ham, one of the plaintiffs below, who had long resided in the city of Archibison, approached said sheriff and handed to him a list of persons and solicited the sheriff to summon the said persons as such jurors. The sheriff, however, carefully tried to avoid summoning any of them as jurors, but by oversight or inadvertence did summon at least one of them, and this person served on the jury that found the verdict in this case. It is this verdict, and the judgment founded thereon, that the plaintiffs in error (defendants below) now seek to have set aside. About the same time another person, who carried on business in the same room with Ham, applied, through an attorney in the court, to the sheriff to be summoned on the jury, and when this case was called for trial and the jury was being impaneled, this same person was found present in the courtroom, among the bystanders, but the sheriff did not summon him on the jury. Other suspicious circumstances occurred before and during the trial not necessary to be mentioned. But these circumstances, together with those heretofore mentioned, tend very strongly to show an attempt to pack the jury and to obtain a verdict by unfair and unwarrantable means. It may be that the conduct of Ham and others was innocent, and the parties connected therewith testify that it was innocent, but it seems almost impossible to believe that all of such conduct should be innocent. The circumstances are certainly very suspicious. It may also be that the seeming misconduct of the plaintiffs did not affect the verdict of the jury; but it may be that it did, and we cannot say that we feel clear that it did not, and this is all that is necessary to require a reversal of the judgment. When a party has committed a flagitious act in order to obtain some undue advantage over his adversary, as it would seem one of the plaintiffs in this case did, such party should not ask that the other parties should show that they were in fact prejudiced by this act. On the contrary, he should be compelled to show clearly and beyond all reasonable doubt, if not beyond all doubt, that such parties were not prejudiced by his unwarranted and reprehensible misconduct.”

¹⁸ See *May v. Ham*, 10 Kan. 600, and opinion therein quoted in last preceding note.

§ 83. Treating jurors.

In the foregoing illustrations the circumstances—whether held to entitle the party to a new trial, or the contrary—the coming together and intercourse was to all appearances mutual. A different case is presented where a party seeks the society of the juror and extends favors, however trivial, during the trial, which are accepted by the juror without protest or reluctance. One of the most frequent forms of impropriety of this kind is what is known as “treating.” The cases afford numerous illustrations. A few of them will be given. Where during an adjournment the defendant took two jurors into a saloon and treated them to liquor, it was held to warrant the granting of a new trial,²³ and a new trial was granted to the

(where party and jurors, casually meeting and taking a drink at the bar together, there being nothing said about the case, was held to ground for new trial); *Central R. R. etc. Co. v. Wiggins*, 91 Ga. 508, 17 N. E. 187 (where a juror, at a recess of the court, merely took plaintiff by the arm and assisted him down the courthouse steps, plaintiff needing assistance); *City of Beardstown v. Smith*, 150 Ill. 169, 37 N. E. 211 (where plaintiff and a juror walked and conversed a short distance together between the courthouse and the hotel where they both stayed, nothing being said about the case); *Wise v. Bosley*, 32 Iowa, 34 (where the defendant, unaware that the person addressed was on the jury, asked him: “What he thought of the case—if it was not a singular case,” but said no more upon being informed that the latter was one of the jurors).

²³ *Vose v. Muller*, 23 Neb. 171, 36 N. W. 583. See, also, *Harvester Co. v. Hodge*, Com. P. C. Pa. Dist. Rep. 378; *Bender v. Buchrer*, 8 Ohio C. C. 244. In *Vose v. Muller*, supra, the court, after setting forth the affidavit, said: “The facts stated in the foregoing affidavit may be viewed in two aspects: 1. As to the offering by the defendant, and the accepting by the jurors from him, of a treat, while engaged in the trial or hearing of a cause in which he was a party; and 2. As to the drinking of intoxicating liquor, per se, by the juror while engaged in the trial or hearing of the cause.” After reviewing several authorities, the court concluded as follows: “In the case at bar the intoxicating liquors were furnished to the jurors, and paid for by the party to the suit in whose favor a verdict was rendered. The question of the unauthorized drinking of intoxicating liquor per se by the jurors does not properly arise. If it did, speaking of myself alone, I could not hesitate to hold it sufficient to vitiate the verdict. But where, as in this case, the liquor is received as a treat at a public bar, by a juror engaged in the trial of a cause, by a party to the suit, and drank by him as such, it can-

plaintiff. Where cigars were passed in to a jury through a window, with apples which a juror had ordered and paid for, with a remark by the person passing them in "that these are ——— cigars," giving the name of the defendant, although the remark was immediately qualified with the further remark that the jury might consider the cigars from either.²⁴ It is not necessary in such cases that the treating be done by a party to the record. It is sufficient if the party guilty of the impropriety be interested in the result; for instance, a sheriff, earning a reward in case of conviction in a criminal case.²⁵

It is also sufficient to vitiate the verdict if the party treating jurors be closely related to the prevailing party, there being no other inference than that of his desire to improperly influence the jury.²⁶ Nor is it absolutely necessary that the treating should occur during the trial. Treating after the return of the verdict, coupled with other circumstances occurring during, or even antedating, the trial, may be sufficient to entitle the party to a new trial.²⁷ It will be hereinafter seen that all

not be doubted that a verdict following such misconduct, and which necessarily rests under the suspicion of having been influenced thereby, should be set aside." In *Wilson v. Abrahams*, 1 Hill, 207, the court said: "When, in the course of the trial, a juror has in any way come under the influence of the party who afterward has the verdict, or there is reason to suspect that he has drunk so much, at his own expense, as to unfit him for the proper discharge of his duty, . . . the verdict ought not to stand."

²⁴ *Veneman v. McCurtain*, 33 Neb. 643, 50 N. W. 955.

²⁵ *People v. Myers*, 70 Cal. 582, 584, 12 Pac. 719.

²⁶ *Endowment Bank etc. v. Steele*, 107 Tenn. 1, 63 S. W. 1126.

²⁷ See *Endowment Bank etc. v. Steele*, 107 Tenn. 1, 63 S. W. 1126; *Grace v. Martin*, 83 Ga. 245, 9 S. E. 841; *Pinkston v. Mercer*, 112 Ga. 365, 37 S. E. 365; *Montgomery v. Township*, 26 Pitts. Leg. Jour. 193. In *Grace v. Martin*, supra, the court said: "If counsel should so far forget the dignity and decency of his profession as to make it a habit or custom, when jurors are about to try cases in which he is engaged as counsel, to treat the juror or jurors to spirits, soda water, or anything else, the trial court should not only set aside the verdicts rendered in such cases, but should punish the counsel who is guilty of such conduct. If such indecent and reprehensible practices were allowed by the courts, an upright lawyer, who would scorn to act in this manner, could not compete with one given to such practices. We do not know, and are unwilling to believe, that

such instances are also instances of misconduct on the part of jurors.²⁸ But where a party is involved in such misconduct, the better ground for new trial is under this head.

§ 84. Entertaining and extending hospitality to jurors.

Differing from treating but little in its character, and without material difference as to its effect on the verdict, when assailed on motion for new trial, is entertaining and extending hospitality to a juror or jurors. The following is a good illustration: When the jury were sent out it was suggested by the court that no provision was made by law for furnishing meals to the jury. Counsel were asked, if it became necessary to give the jury refreshments, whether the parties would share the expense. Defendant's counsel declined to do so. Meals were subsequently provided and paid for by plaintiff, and it was held that a verdict in his favor must be set aside.²⁹ And a new trial was granted, where the jurors were furnished meals at a restaurant kept by the person chiefly interested in a verdict in favor of the party in whose favor it was returned.³⁰ So, where the jury boarded at the house of the sheriff, who was interested in the reward offered and payable in case of conviction, it was held to entitle the defendant to a new trial, although there was no evidence that he communicated with any of them. There was evidence, however, that he, on several

any lawyer in this state is guilty of such misconduct, but if such be true, the trial court, when such misconduct is brought to its attention by proper allegation in a motion for a new trial, should take cognizance of it, and if proved, the verdict rendered under such influence should be set aside." In the second Georgia case the facts were held not to warrant a new trial.

²⁸ Post, §§ 175, 176.

²⁹ Johnson v. Hobart, 45 Fed. 542.

³⁰ Redmond v. Royal Ins. Co., 7 Phila. 167. See, also, Walker v. Hunter, 17 Ga. 414 (where two jurors passed one night during the trial at the house of one of the attorneys for the successful party, and a new trial was granted); McIntyre v. Hussey, 57 Me. 494 (where, prior to the jury being selected and sworn, the defendant entertained during Sabbath one of the panel, who afterward became foreman of the jury, conversing with him about the case and exhibiting to him a glass which was the subject of the suit. An allegation in a motion to set aside a verdict that defendant had been

occasions, walked through the room where they were kept.³¹ And where a juror took a drink of liquor upon the premises he was reviewing as a jurymen, and at the bar of the principal witness for the prosecution, it was held to entitle the defendant to a new trial.³² In this instance the misconduct of the juror is the most conspicuous element, perhaps, in the act constituting the ground for a new trial.

Entertainment and furnishing food and shelter as a ground is not limited to jurors, as such. It may assume other forms. It was held that it might consist in the keeping and feeding their horses without charge.³³ But circumstances may attend the act alleged to constitute the extending of entertainment or hospitality, which relieve it of all suspicion, and entirely devest it of impropriety.³⁴

§ 85. Conversation about case between party and juror.

The case of a party conversing with a juror about the case on trial differs from that of undue intimacy, treating and en-

in the habit of entertaining jurors during the terms of court was held too general, and should not be regarded); *Grace v. Martin*, 83 Ga. 245, 9 S. E. 841; *Keegan v. McCandless*, 7 Phila. 167 (where a juror, with others, ate and drank with the plaintiff at a tavern at the latter's expense, and a conversation was held between them as to what the verdict should be).

³¹ *Clapp v. State*, 94 Tenn. 186, 30 S. W. 214.

³² *People v. Hull*, 86 Mich. 449, 49 N. W. 288.

³³ *Springer v. State*, 34 Ga. 381. In this case the court expressed the policy of the law and the strictness of its enforcement in these words: "The honor of the bar and the perfect purity of the jury alike demand their entire separation, in their personal and social intercourse, whilst trials are progressing. However harmless in themselves, as was the conduct of our respected brethren in these cases, we feel ourselves called upon, in this case and every case where this separation is not preserved with the utmost care, to evince, in the most decisive manner, our purpose to shut up every avenue through which corruption, or the influence of friendship, could possibly make an approach to the jury-box."

³⁴ Lunch furnished jury at expense of a city, a party to the action, where the jury did not know until after the verdict at whose expense the lunch was furnished, held no ground for new trial: *Vane v. City of Evansville*, 150 Ill. 618, 37 N. E. 901. Hospitality extended by a party to a juror after verdict found, sealed and deliv-

to one of the jurors.⁸⁶ Communications between prosecuting witnesses and jurors in criminal cases are looked upon with grave suspicion, and even when the subject of a conversation between them is not shown, a verdict will sometimes be set aside in the absence of a satisfactory explanation showing that no influence upon the verdict was sought. And when, during a recess, the prosecutor conversed with some of the jurors, no explanation being given as to the subject of the conversation, it was held that a new trial should be granted.⁸⁷

§ 86. Conversation between counsel and juror.

Conversations between counsel for a party and jurors stand upon the same footing as, and give rise to still more unfavorable presumptions than, those between parties and jurors, discussed in the next preceding section, especially where not casual and innocent on the face of the matter. And it may be stated as a general rule that unauthorized communication between jurors and an attorney for the successful party warrants a new trial.⁸⁸ Accordingly, where, after the jury were

be innocent, and without intention to have any effect on the juror. The judgment of the lower court should be reversed because of the misconduct of the plaintiff, as shown above." See, also, *Railway Co. v. Schroeder* (Tex. Civ. App.), 25 S. W. 306; *Marshall v. Watson* (Tex. Civ. App.), 40 S. W. 352; *Beasley v. Denson*, 40 Tex. 436; *Woodward v. Leavitt*, 107 Mass. 453, 9 Am. Rep. 49; *Ensign v. Harney*, 15 Neb. 330, 48 Am. Rep. 344, 18 N. W. 73; *Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449; *Goar v. Thompson*, 19 Tex. Civ. App. 330, 47 S. W. 65; *Hilton v. Southwick*, 17 Ma. 303, 35 Am. Dec. 253; *Irwin v. Miller*, 23 Ill. 349; 13 Am. & Eng. Ency. of Law, 373; *Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. Rep. 30, 36 L. ed. 917; *Perry v. Bailey*, 12 Kan. 539; *Fessenden v. Sager*, 53 Me. 531.

⁸⁶ *Cohn v. Roberts*, 3 Strob. 410.

⁸⁷ *Commonwealth v. Mathis* Pa. O. & T., 16 Pa. Co. Ct. Rep. 140.

⁸⁸ *Edney v. Baum*, 44 Neb. 294, 62 N. W. 461. In this case the court, in reversing an order denying a new trial, said: "The proof on another point is unworthy of comment. E. M. Wolfe states that, during the deliberations of the jury, he was in company with one of the attorneys for the defendants, and, while beneath the window of the room within which the jury was deliberating, the window was opened. Two of the jurors stood in the window, when affiant's companion raised his hands and said: 'Throw it down to me, and I

propriety of intercourse between parties or their counsel and jurors. And, for like reason, circumstances attending intercourse between them may give such intercourse an appearance which will warrant an inference to the prejudice of the opposite party with respect to a verdict subsequently rendered against him and entitle him to a new trial, without proof of any conversation about the case, in order to vindicate the court and its proceedings from imputations to their discredit, if for no better reason.⁴³ As matter of fact, circumstances are of greatest importance in all cases of irregularity of the adverse party.⁴⁴ Their importance could not possibly be shown in a stronger light than in a case where, in an action for damages for personal injuries the plaintiff, in going to and from the witness-stand, used crutches, was assisted by his father, and held one foot bent and off the floor, it being fully shown that, both before and immediately after the trial, plaintiff walked readily without crutches.⁴⁵ Surely no mere verbal appeal for sympathy and favor, no oral misrepresentation of facts could equal that. In another case liberal and conspicuous patronage of a saloon kept by a juror, by a relation of plaintiffs in the action, was held ground for ordering a new trial after verdict for plaintiffs.⁴⁶ And it was held that a new trial should be granted where it was shown that the successful litigant and one of the jurymen, during the progress of the trial, had been promenading the street, conversing together, and playing cards and drinking together in a saloon.⁴⁷

Underlying the decision condemning such conduct is an important rule of public policy. This was placed in a strong light by the court, per Scott, J., in the case last cited, where he said: "Nothing was said as to whether the plaintiff or the juryman

⁴³ See *Central Georgia Ry. Co. v. Hammond*, 109 Ga. 383, 34 S. E. 594.

⁴⁴ See *Bentz v. Borough of South Bethlehem*, 7 North Co. Ct. R. (Pa.) 107.

⁴⁵ *Cooley v. New York etc. R. Co.*, 42 N. Y. Supp. 941, 12 App. Div. 409. See *Reynolds v. Champlain Transp. Co.*, 9 How. Pr. 14, where, in the presence and hearing of jurors, the defendant abused the plaintiff, reciting what he claimed were the facts of the case.

⁴⁶ *Pamer v. Utah etc. Ry. Co.*, 2 Idaho, 382, 13 Pac. 425.

⁴⁷ *Vollrath v. Crowe*, 9 Wash. 374, 376, 37 Pac. 474.

paid for the liquor which was drank by them while they were playing cards together. It seems that defendants were unable to obtain any proof in relation thereto, but we think it is fair to assume that it was paid for by the plaintiff. It was a matter within his knowledge, and he had an opportunity to show the fact if it was otherwise, and having failed to do so it should be presumed against him under the circumstances. While we do not say what we would do as an appellate court if the disposition of the case rested upon this one question, as the granting of a new trial is largely intrusted to the discretion of the lower court, yet we may safely say that were the proposition before us originally as a trial court, we would grant the motion for a new trial upon this ground, if there were no other reasons to warrant it. Such conduct upon the part of the plaintiff and the juryman was reprehensible in the extreme. Instead of seeking each other's society, they should rather have avoided it. Trials of causes should have the appearance of fairness, and it would tend greatly to bring judicial proceedings into disrepute if matters of this kind should be overlooked or tolerated."

§ 89. Parties in *pari delicto*.

Parties or their attorneys may both be simultaneously guilty of irregularities with respect to the jury, and thus both be deprived of any right to complain that the verdict was improperly influenced. In such case, it is immaterial that the episode amounts to misconduct of the jury. Being in *pari delicto*, the losing party will be refused a new trial; for instance, where jurors went into a saloon and were there treated by lawyers for both sides.⁴⁸ But such conduct was severely condemned by the appellate court, where it was said that, were it not for the participation of both sides, the verdict should be set aside.

§ 90. Consisting in improper deportment of counsel in court—Argument.

It may be stated generally that if counsel for a party grossly abuses his privilege to the manifest injury of the adverse party,

⁴⁸ *McLaughlin v. Hinds*, 151 Ill. 403, 38 N. E. 136. See, also, *Bradshaw v. Degenhart*, 15 Mont. 267, 48 Am. St. Rep. 677, 39 Pac. 90, where defendant drank with jurors at plaintiff's expense.

drawn, the appellate court will reverse the case and order a new trial; as where, in a suit against a railroad company, for injuries, plaintiff's counsel said to the jury, "You ought to deal severely with these bloated corporations, that can run their road right through a man's house or yard," and the court did not control him, and the jury found a verdict for plaintiff "for the amount sued for" (\$20,000).⁵⁷ On the other hand, a new trial will not be ordered on the ground of improper remarks of counsel, in argument, where the verdict returned was the only one that could have been rendered under the facts established.⁵⁸

Conduct of the adverse party or of his counsel, in the conduct of the proceedings prior to the trial, for instance dilatory proceedings taking a change of venue, and the like, are not proper matters for discussion before the jury. In *Lindsay v. Pettigrew*⁵⁹ a new trial was ordered for this cause. Colson,

⁵⁷ *Galveston etc. Ry. Co. v. Cooper*, 70 Tex. 67, 8 S. W. 68; *Lindsay v. Pettigrew*, 3 S. Dak. 199, 52 N. W. 873, where refusal of trial court to grant a new trial was held on appeal to be an abuse of discretion.

⁵⁸ *Cooper v. Delk*, 108 Ga. 550, 34 S. E. 145.

⁵⁹ 3 S. Dak. 199, 52 N. W. 873, 874. In *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582, Mr. Chief Justice Ryan, in an opinion reversing a judgment for the misconduct of an attorney, in his argument, says: "Doubtless the circuit court can, as it did in this case, charge the jury to disregard all statements of fact not in evidence. But it is not so certain that a jury will do so. Verdicts are too often found against evidence, and without evidence, to warrant so great a reliance on the discrimination of juries; and, without notes of the evidence, it may be often difficult for juries to discriminate between the statements of fact by counsel following the evidence and outside of it. It is sufficient that the extra-professional statements of counsel may gravely prejudice the jury and affect the verdict. . . . It is the duty and right of counsel to indulge in all fair argument in favor of the right of his client; but he is outside of his duty and his right when he appeals to prejudice irrelevant to the case. Properly, prejudice has no more sanction at the bar than on the bench. But an advocate may make himself the alter ego of his client, and indulge in prejudice in his favor. He may even share his client's prejudices against his adversary, as far as they rest on the facts in his case. But he has neither duty nor right to appeal to prejudices, just or unjust, against his adversary, dehors the very case he has to try. The very fullest freedom of speech within the

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§ 92. **Stating facts—Adding to evidence.**

Courts look with the same disfavor upon assertions by counsel in argument at the trial of facts, material to the issue, but not in evidence, as upon appeals to prejudice and passion, abuse and defamation, considered in the next preceding section. And the adding of a material fact by assertion during oral argument, by prosecuting counsel, the court failing to prevent it when requested, or failing to instruct the jury to disregard it where not prevented, is ground for new trial.⁶⁴ An excellent illustration of this rule was afforded in a case tried and appealed in the federal courts. Where it appeared that a writing introduced in evidence was claimed for the first time upon the argument to the jury, to disclose additional matter of a material character, which in fact was discernible by the aid of a microscope, it was held that such matter was not properly in evidence, and that the disclosure thereof and argument founded thereon were prejudicial to defendant so as to require the granting of a new trial.⁶⁵ But a distinction must be kept in mind between false, or mistaken statements of evidence and statements as to its effect, especially when it is conflicting.⁶⁶ Nor are bona fide disputes between counsel as to what the evidence is, within the rule. When such disputes arise, if the presiding judge is not prepared from his memory or notes to settle it, he may properly submit the matter to the recollection of the jury.⁶⁷ And if any particular result may reasonably be inferred from evidence, however improbable such inference may

⁶⁴ *People v. Mitchell*, 62 Cal. 411; *People v. Lee Chuck*, 78 Cal. 329, 20 Pac. 719; *People v. Smith*, 121 Cal. 355, 361, 53 Pac. 802; *McDonald v. People*, 126 Ill. 156, 9 Am. St. Rep. 559, 18 N. E. 817; *Lasor v. Smith*, 57 Mo. App. 584; *Bridges v. State*, 110 Ga. 246, 34 S. E. 1037; *Bradham v. State*, 41 Fla. 541, 26 South. 730.

⁶⁵ *Preston v. Mutual Life Ins. Co. (C. C.)*, 71 Fed. 467. Other cases in which judgments reversed because of imputations by counsel of facts not pertinent to the issue, and calculated to prejudice the case: *Tucker v. Henniker*, 41 N. H. 317; *State v. Smith*, 75 N. C. 306; *Ferguson v. State*, 49 Ind. 33.

⁶⁶ *Hatcher v. State*, 18 Ga. 464.

⁶⁷ See *People v. Barnhart*, 59 Cal. 402; *People v. Lee Ah Yuts*, 60 Cal. 95, 97. Cited in *State v. Phelps*, 5 S. Dak. 495, 59 N. W. 471, holding that if the substantial rights of the accused are not prejudiced by counsel's statements, the judgment will not be reversed.

of granting or denying a new trial at of counsel in asking questions and discretion of trial courts.⁷⁵ But aptate to reverse judgments and order a clear abuse of privilege is shown ations upon prosecuting attorneys in stated in *People v. Ryan*:⁷⁶ "An atld not ask inadmissible questions for aspicions in the minds of the jurors unt; nor repeat a question to which tained; nor during the progress of unjustly injurious to the defendant. efendant from having that fair trial innocent or guilty, he is entitled." osecuting attorney asked the defendbehalf, incompetent questions which e evident intention of impressing the the minds of the jurors, the supreme t be said that the questions were not nt, though he answered them in the onger case for reversal is made where ombines his own hostile and nonperthose of a biased and hostile witness. ' the prosecution in a murder case pportunity to impute the killing of by statements not called for by the tements by the prosecuting attorney od right for his evident malice and l be glad to tell the jury the cause of oy the court, this was held to constia new trial.⁷⁸

and again in *People v. Mayes*,⁸⁰ the

⁷⁵ Iowa, 491, 39 N. W. 804.

⁷⁶ 451.

Cal. 138, 145, 17 Am. St. Rep. 223, 23
v. Hamberg, 84 Cal. 468, 474, 24 Pac.

Mo. 23, 62 Pac. 833.

⁷⁸ 945.

⁸⁰ 860.

sheriff is disqualified the coroner should be designated to act in his stead, and if the coroner proves to be disqualified by reason of bias or other reason, the court may appoint an elisor to have charge of the jury.⁸⁵ Unless the disqualification or inability to act of both sheriff and coroner be shown, it is a fatal irregularity, where properly taken advantage of, to have the jury summoned by an elisor appointed by the court.⁸⁶

§ 96. Tampering with and keeping from the trial adversary's witnesses.

Thus far we have discussed irregularities of counsel having a tendency to prevent a fair unbiased consideration by the jury of the case as actually presented to them. We now come to consider conduct having the effect of unfairly and fraudulently keeping from them evidence which the other side is entitled to have them receive and consider. Successful attempts to influence witnesses of the opposite party to remain away, or to refuse to testify or to testify falsely, or any other interference with them, having a tendency to prevent a fair trial, will be good ground for a new trial.⁸⁷

connection merely that it may not be overlooked. The question was properly raised as an error of law occurring during the trial, and as such is further considered elsewhere: See chapter 14.

⁸⁵ *People v. Eubanks*, 117 Cal. 652, 49 Pac. 1049.

⁸⁶ *People v. Fellows*, 122 Cal. 233, 54 Pac. 830.

⁸⁷ *Crafts v. Union Mut. Ins. Co.*, 36 N. H. 56, where plaintiff's agent hired a material witness, for whom the defense were searching, to absent himself, and the defendant failed to secure his attendance: *Carey v. King*, 5 Ga. 81. In *Crafts v. Ins. Co.*, supra, the court fully discussed the alleged newly discovered evidence, and, after reaching the conclusion that it was not material, said: "Upon all the grounds of the motion for a new trial, based upon the facts that material evidence has been discovered since the trial, the motion must be denied. But upon the ground of misconduct of the plaintiff or his agent, Martin Crafts, in proceedings connected with the trial, for which he should be held responsible, we think the motion should be granted. . . . From the affidavits of Swain and Pearsons it appears that Martin, having learned that inquiry had been made of Pearsons relative to the signing of the note before the loss, by Mr. Lancaster, who it is understood was acting in the matter in behalf of the company, hired Pearsons to absent himself, so that he could not be summoned as a witness. It does not appear

§ 97. Suppressing and concealing evidence.

Courts freely condemn all suppressions and concealments of documentary evidence already brought into court, which the jury are entitled to have delivered to them, or which a party has a right to have the jury consider, whether such suppression or concealment be accomplished by trick, misrepresentation or otherwise. Thus where it had been agreed between counsel that certain papers should be delivered to the jury upon their retirement, and when they were about to retire counsel for the defendant, by trick, managed to abstract and withhold some of them, the verdict in defendant's favor was set aside and a new trial granted.⁸⁸

§ 98. Knowingly introducing false testimony.

Where a losing party is able to make out a clear case of wholesale fabrication of evidence or of perjury and subornation of perjury, he should, perhaps, be granted a new trial; but usually he should move upon the ground of surprise or of newly discovered evidence. It was held in New York that a verdict should be set aside and a new trial granted for the knowingly introducing perjured testimony; and the court also held that the mere fact that the evidence which showed that

that defendants proposed to summon him; but it does appear that they were instituting inquiries which, if he had not been kept out of the way, would probably have resulted in his being summoned. Martin is the brother, as well as the principal witness of the plaintiff. He resided in Nashua, where the controversy arose, while the plaintiff resided at a distance. He admits that he collusively transferred a portion of his property to the plaintiff, in fraud of his creditors; and the circumstances of the transaction tend to raise a strong suspicion that the entire sale from him to the plaintiff was merely colorable. It may well be understood that the plaintiff yielded to him the management and preparation of the cause for trial. It is immaterial whether he did so, because the sale being merely colorable, Martin remained, in fact, the party in interest, or because, the sale being bona fide, and he, therefore, the real plaintiff, intrusted the conduct of the cause to Martin, as his agent. Neither can he be permitted to enjoy the fruits of a verdict which the misconduct of Martin, in thus suppressing testimony material to a full and fair investigation of the case, whether acting as principal or as agent of the plaintiff, may have tended to secure."

⁸⁸ *Hastings v. McKinley*, 2 E. D. Smith, 47.

§ 100. Fraud practiced in matter of presenting points and authorities.

One recent decision, perhaps the only one upon an old abuse from which relief should have been granted long ago, was in a case where findings showed that after the arguments were closed, defendant's counsel placed on file and handed to the court a brief in which he discussed questions material to the case, and that the court read the brief before deciding the case, and it did not appear that the brief was ever submitted to the opposing counsel for examination, or that they had any knowledge of its filing or its contents. Plaintiff was held entitled to a new trial though the trial judge said in rendering his decision, that he was not influenced by such brief. Such an irregularity (misconduct) was held to amount to a denial of the right of plaintiff to be heard in court.⁹³ The opinion of the trial judge, in such case, that he was not influenced by reading the brief should be viewed in the same light, to some extent, as that of a juror who has received evidence out of court; that is to say, it should be rejected, as was done in this case.

§ 101. Of duty of counsel to call matter to court's attention.

Something has been already said in several connections, under this head, of the duty of the party liable to be injured by an irregularity of the adverse party, or of his attorney, or other agent, to call the matter to the attention of the court if the opportunity be afforded, with a view to having it rectified or its mischievous effects removed. As a general rule he will be required to show that this has been done, before a new trial will be granted upon his application.⁹⁴ But the rule is subject to exceptions. The exceptions to the rule have been already noted, however, in proper connections hereunder.

⁹³ *Spiro v. Nitkin*, 72 Conn. 202, 44 Atl. 13.

⁹⁴ See *Bradshaw v. Degenhart*, 15 Mont. 267, 274, 48 Am. St. Rep. 677, 39 Pac. 90; *Tucker v. Salem F. M. Co.*, 13 Or. 28, 34, 7 Pac. 53; *White v. Wood*, 8 Cush. (Mass.) 413; *Flesher v. Hale*, 22 W. Va. 44; *Davis v. Allen*, 11 Pick. 468. Defendant should ask court to rule out improper remarks, and to charge jury to disregard them: *Morgan v. Hugg*, 5 Cal. 409. Where court temporarily absent when improper remarks are made, his attention should be called to them when he returns, and failure to do so is good reason for refusing

§ 102. Counsel

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CHAPTER 7.

ORDERS AND RULINGS RELATING

- § 103. How far considered.
- § 104. Two methods of review—Whole record.
- § 105. Statutory provisions.
- § 106. Amendment usually permitted upon proper practice.
- § 107. Large discretion conceded to trial court.
- § 108. Same—Cause of action cannot be changed.
- § 109. Distinction between changing remedy of action.
- § 110. Same—Where new facts arise pending trial.
- § 111. Same—Error herein; how reached.
- § 112. Same—Amending answers.
- § 113. Amendments not usually permitted after demand.
- § 114. Amendment not allowed to give unfair advantage.
- § 115. Diligence required.
- § 116. Diligence—How far stage of proceedings.
- § 117. Amendments at trial.
- § 118. Allowance of amendment after judgment.
- § 119. Same rules apply in special proceedings.
- § 120. Amendment of prayer.
- § 121. Court may impose reasonable conditions.
- § 122. Waiver of right to object to improper amendment.

§ 103. How far considered.

It would be impossible as well as unpractical presentation of all the law declarations upon the right of the parties for courts to permit amendments be sufficient for the present purpose to

principal limitations upon the power of trial courts in allowing and refusing amendments.¹

§ 104. Two methods of review—Whole record considered.

It is proper to make the same prefatory statement here as is made at the beginning of the chapter on continuances.² Where the appellate court has reversed on appeal from the judgment on a bill of exceptions for abuse of discretion in refusing to allow or in permitting an amendment, the same showing on motion for new trial would entitle him to a new trial, and to a reversal in case of a denial of the motion. But if it appear from the whole record that no injury has resulted from the action of the court in granting or denying the application, its ruling furnishes no ground, either for reversal or new trial. Thus, where an amendment was permitted at the trial by which the statute of limitations was pleaded, which should not

¹ That the filing of an amended pleading is a waiver of any error in sustaining a demurrer to a previous complaint or answer, or in striking out a portion of a previous complaint, is too well and generally known to require discussion or extensive illustration: See *Brittain v. Oakland Bank of Savings*, 112 Cal. 1, 44 Pac. 339. After amendment of pleading admissions contained in the original pleading are not admissible in evidence: *Miles v. Woodward*, 115 Cal. 808, 46 Pac. 1076.

What Constitutes Amendment.—A mere order permitting the amendment of a pleading is of no effect unless, and until, complied with: *Kimball v. Groshart*, 12 Cal. 27. But the fact that an amendment which had been allowed was not actually made and filed until after the verdict and entry of judgment, was held to be error without prejudice, it appearing that the case was tried with reference to it: *Stark v. Wellman*, 96 Cal. 400, 31 Pac. 259. In a later case it was held that the failure to make the amendment allowed formally upon the record did not necessitate a reversal of the judgment, but the record would be ordered to be corrected to conform with the order permitting the amendment: *French v. McCarthy*, 125 Cal. 508, 58 Pac. 154.

A defendant was sued by fictitious name, and appeared and answered by true name, which the court ordered to be inserted in the complaint, which, however, was not done. Held, that the order, in connection with the finding that by said order the complaint was amended, constituted an amendment: *Hoffman v. Keston*, 132 Cal. 195, 64 Pac. 264.

² See next chapter.

have been permitted, and the court disregarded such plea in its final decision, it was held that the objecting party was not aggrieved by the action of the court in permitting the amendment.³ In another case the refusal of the trial court to allow an amendment during the trial was held an abuse of discretion, although its allowance might have necessitated a continuance.⁴

Nor can an order refusing to allow a reasonable exercise of the right to amend an answer be upheld upon the ground that the evidence at the trial does not support, or was inconsistent with the defense stricken out. A defense which a party is not allowed to plead is not likely to find support in the evidence offered or admitted at the trial. In *De Baker v. Southern California Ry. Co.*,⁵ Chief Justice Beatty, delivering the opinion,

³ *Hibernia Savings etc. Soc. v. Jones*, 89 Cal. 507, 26 Pac. 1089.

⁴ *McDougal v. Hulet*, 132 Cal. 154, 64 Pac. 278. The court, after stating the facts said: "The court refused to permit the defendant Boggs to amend his answer in the respects named, and in this the court abused its discretion. The facts, if true, were of vital importance to Boggs. The case had not terminated. If the plaintiff had been surprised by the offered amendment, the court could, and should, have granted a continuance upon just terms, so as to fully protect the rights of plaintiff. It seems to be the opinion of many trial judges that amendments should seldom be allowed pending the trial. Why not in all proper cases? The object of the trial is to settle and dispose of the issues, and all matters connected with the case, in the one action. If the facts in this case set up in the second amended answer were true, then Boggs was entitled to relief. If they were not true, every opportunity should have been given plaintiff to so convince the court. The rule has been often stated here, that during the trial, the court, in furtherance of justice, should allow amendments liberally in order to mold and direct its proceedings, so as to dispose of cases upon their substantial merits, and without unreasonable delay, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right." To the same effect, *Roland v. Kreyenhagen*, 18 Cal. 455; *Burns v. Scooffy*, 92 Cal. 271, 33 Pac. 86.

⁵ 106 Cal. 257, 281, 39 Pac. 610. *Stringer v. Davis*, 30 Cal. 318, was also an excellent illustrative case of abuse of discretion in refusing leave to amend. In reversing the judgment and ordering a new trial the court said: "But assuming the allegation of the complaint to be good and the denial bad, still the court erred in not

said: "It is true, as above stated, that the evidence adduced at the trial not only failed to sustain this defense, but was in direct conflict with it. It showed clearly that the levee was constructed by the defendant—apparently for purposes of its own—more than a mile beyond its southern extremity as designated in the ordinance; and it showed that this additional and unauthorized portion of the levee was the only part that encroached upon the natural bed of the stream. The maps, diagrams, and other evidence introduced by the defendant, no less than the evidence introduced by the plaintiff, all agree upon this point, and all tend strongly to show that but for this unauthorized addition to the levee, as planned by the city, the damage to plaintiffs' lands would not have occurred. But we cannot, for this reason, hold that the order striking out was harmless error. But for the order the defendant might have introduced evidence as to these matters that would have changed the aspect of the case, and we cannot assume that as the evidence is, the jury would have viewed it in the light in which it appears to us, if the case had been submitted to them upon the theory that the defense pleaded was a good defense."

And a plain case of abuse of discretion is shown where a plaintiff is permitted to amend and the defendant is denied the right to amend so as to meet the new issues or changes in the issues thus wrought, especially if the necessity for the amend-

allowing the defendant to amend the denial in the mode proposed. The reason assigned by the court for denying the defendant's motion, to the effect that if the amendment was allowed, a recovery by the plaintiff might thereby be defeated, can hardly be received as sufficient; on the contrary, it would seem to be a very good reason why the amendment should have been allowed, if, as provided, amendments are to be allowed or denied in furtherance of substantial justice, by which we understand such justice as the law administers when correctly applied, and not such as may be dictated by the abstract and varying notions of an individual as to what the equities of the case may be. It is true that motions of this character are said, in general terms, to rest very much in the discretion of the court; but the discretion intended, as we have often had occasion to remark, is a legal discretion to be guided by the fixed principles of law." It will be observed that the court, at first incorrectly, designates the act of the lower court as error, and subsequently, correctly, as an abuse of discretion.

ment be caused by an oversight. In a case of this kind the court, per Dunbar, J., said: "This court is loath to interfere with the orders of a trial court in the disposition or formation of the pleadings, for the reasons which have often been stated, and will never interfere with the discretion of a court in such matters unless it plainly appears that substantial injustice has been done by the abuse of discretion. But it seems to us that in this case substantial injustice was done to the appellant, the defendant below. The plaintiffs could not in any manner have been taken by surprise by the pleading offered by the defendant, for the same allegations had been twice made by the former answers, and it appeared that the omission in the amended answer offered was a pure oversight or mistake on the part of counsel. We have mentioned somewhat at length the different pleadings in this case and the orders of the court, to show that the court had been liberal in allowing amendments, and especially liberal in allowing what was termed the supplemental complaint of the plaintiffs, and it was by reason of this permission that the omission occurred in the answer of the defendant, because, before that, the question of fraud was placed in issue. This was substantially all the defense that the defendant had to the action, and the case will eventually be determined largely upon that proposition, and to deprive him of the right to put in issue a substantial defense where no good reason appears for such deprivation, it seems to us was a plain abuse of discretion on the part of the trial court."⁶

In an Oregon case⁷ the petition in a suit on an insurance agent's bond alleged that defendants, as plaintiff's agent, executed with other defendants the bond for the payment of all moneys received; that the conditions of such bond were violated; that plaintiff and such defendants had an accounting and the amount sued for found due plaintiff. The court held that the action was on an account stated, and the plaintiff moved to amend by striking out the portion referring to an accounting. It was held on appeal that such amendment was

⁶ Van Lehm v. Morse, 16 Wash. 672, 674, 48 Pac. 404.

⁷ Bailey v. Wilson, 34 Or. 186, 55 Pac. 973. To same effect, Foster v. Standard etc. Ins. Co., 26 Or. 449, 38 Pac. 617.

improperly refused, since sufficient would have remained to constitute a cause of action for breach of the bond.

§ 105. Statutory provisions.

The Code of Civil Procedure of California contains several sections on the general subject, some pertaining directly and others incidentally to various amendments. The present purpose will be accomplished by confining the discussion to amendment of pleadings. Section 472 relates to first amendments of right, or "of course" and requires no special notice. Section 473 reads in part as follows: "The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect. . . . The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars," etc.⁸

Many decisions manifest the liberal construction given by the courts to such statutes. "Amendments to pleadings, so as to enable the party to prove all the facts necessary to his cause of action or defense, are favored. If by reason of such amendment the opposite party is taken by surprise, the cause can be continued, or time allowed to meet the amendment, or such other terms imposed as may be just under the circumstances. It can very rarely happen that a court would be justified in refusing a party leave to amend his pleading so that he may properly present his case."⁹

⁸ Although the portion of section 473, not quoted above, has been several times amended, in important respects, since it was adopted as part of the Practice Act of 1851, Laws 1851, page 60, Laws 1853, page 276, Laws 1865-6, page 843, the only amendments to the quoted portion were at the adoption of the Code of Civil Procedure, in 1874, when the phrase "allow a party to amend" was substituted for the word "amend," and the words "in its discretion" were inserted after the word "likewise" in the second sentence.

⁹ Crosby v. Clark, 132 Cal. 1, 8, 63 Pac. 1022. See, also, McDougal v. Hulet, 132 Cal. 154, 64 Pac. 278; Frost v. Witter, 132 Cal. 421, 84 Am. St. Rep. 53, 64 Pac. 705; Koland v. Kroyenhagen, 18 Cal. 455; Burns v. Scooffy, 98 Cal. 271, 33 Pac. 86; Guidery v. Green,

course, if "plaintiffs could not file a sufficient bill, for the reason first above discussed," or for any other reason, the additional reason that "they did not ask leave to amend" is a mere dictum. As a support for the dictum, the learned justice cites two cases, neither of which furnish any support whatever. In one of the cases so cited, *Smith v. Taylor*,¹² a demurrer was sustained to a cross-complaint, and the record showed that the defendant was present when the demurrer to his pleading was sustained. In the other case, *Buckley v. Howe*,¹³ the opinion at the page referred to by Justice Henshaw means just the opposite to the meaning attributed to it. Nevertheless, the dictum indicates a correct principle, in view of the provision of section 472 giving the right to amend "of course," and "without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon," etc., which appears to exclude the right to amend "of course" after the stage indicated.

§ 107. Large discretion conceded to trial court, but not unlimited.

Great liberality should be shown by a trial court in permitting, where it can be done without working great delay, such amendments to pleadings as facilitate the production of all the facts bearing upon the questions involved in the action.¹⁴ In *Gould v. Stafford Oil Co.*¹⁵ it was said that this rule is particularly applicable to amendments to answers. It follows that when the court having power to allow or disal-

¹² 62 Cal. 533, 541, 23 Pac. 217.

¹³ 86 Cal. 596, 605, 25 Pac. 132.

¹⁴ See *Burns v. Scooffy*, 98 Cal. 271, 33 Pac. 86; *Crosby v. Clark*, 132 Cal. 1, 8, 63 Pac. 1022, and cases cited.

¹⁵ 101 Cal. 32, 35 Pac. 429. The fact that a defense may have been defectively pleaded in some particulars is not ground for a motion to strike out, but the proper method of reaching such defects is by demurrer, and a party who defectively pleads a good defense should be allowed an opportunity of amending his pleadings; and the denial of leave to amend, and the granting of a motion to strike out an answer so amended constitute ground for a new trial: *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610.

an amendment has exercised that power by granting or refusing an amendment to a pleading, such ruling is only subject to review by the appellate court when it is apparent that abuse of discretion has occurred. The case of *Wixon v. Wixon*¹⁶ contains a presentation of facts warranting a ruling by the court to exercise its liberal powers in the matter allowing amendment. The taking of evidence at the trial almost concluded at the time that the proposed amendment was offered; the same attorneys, in another suit between the same parties, in litigating some of the same rights years before pleaded as a defense in that suit facts very similar to those set out in the proposed amendment, and the proposed amendment was directly contradictory to an admission in the answer which it was proposed to amend.

It scarcely need be stated that the right to amend does not rest upon the court's discretion when given by statutory provisions or implication clearly arising from them. In addition to the right given by section 472 to amend once as a matter of course is the right of a defendant to answer over or to amend his answer to an amended complaint. In such a case the supreme court said without qualification: "Here the plaintiff during the trial, amended his complaint, and the defendant had a right to amend his answer, and his application to amend was permitted to do so was not addressed to the discretion of the court."¹⁷

The courts have frequently designated refusals of trial courts to allow amendments as "error"; sometimes advisedly, sometimes inadvertently.¹⁸ If the statute gives the right to amend, expressly, or by clear implication, and such right be refused by the court, its ruling should be excepted to and assigned for error; if the application to amend be addressed to the discretionary power of the court, and be improperly refused, refusal can only be urged as an abuse of discretion.

¹⁶ 1 Cal. 477, 27 Pac. 777.

¹⁷ *Morton v. Bartning*, 68 Cal. 306, 308, 9 Pac. 146.

¹⁸ For discussion of error as ground for new trial, see chapters 14-15 inclusive.

§ 108. Same—Cause of action cannot be changed.

The principal limitation upon the extent of the change which may be wrought by amendment on the part of the plaintiff, proposed in due time, is this, that the cause of action set forth in the complaint cannot be in substance changed. For instance, it cannot be changed from an action *ex contractu*, to one *ex delicto*;¹⁹ nor from one *ex delicto* to one *ex contractu*.²⁰

A complaint setting forth a cause of action against an administrator in his official capacity cannot be changed by amendment to one setting forth a cause of action against him individually.²¹

Nor should an amendment be permitted which would introduce into the action a new plaintiff having no interest in the cause of action stated in the original complaint. In *Dubbers v. Goux, Admr., etc.*,²² the action was to have the defendants declared the trustees of the plaintiff in the ownership of certain lands, and to compel them to convey to the plaintiff. When the action was called the plaintiff was offered as a witness. The defendants objected on the ground that he was a party against an administrator, upon a demand against the estate of the deceased. Thereupon an affidavit was filed that his wife *Wilhelmina Dubbers* was the real party in interest, and it was moved that she be substituted as plaintiff, and the court granted the motion. The substituted plaintiff recovered judgment and the defendant appealed. That being the only point raised on appeal the supreme court said: "The court erred in permitting *Mrs. Dubbers* to be substituted for her husband as plaintiff. It is not pretended that she had succeeded to any interest held by her husband pending the action, nor that she had any joint interest with him in the subject matter. On the contrary, she

¹⁹ *Ramirez v. Murray*, 5 Cal. 222. See, also, *Hackett v. Bank of California*, 57 Cal. 336; *Wheeler v. West*, 78 Cal. 95, 20 Pac. 45; *Givens v. Wheeler*, 6 Colo. 150.

²⁰ *Hockett v. Bank of California*, 57 Cal. 336.

²¹ *Sterritt v. Backer*, 119 Cal. 492, 51 Pac. 695. The court said: "The rule is that he cannot be sued in the same action *de bonis propriis* and *de bonis testatoris* or *intestatoris*."

²² 51 Cal. 153. For an important case, and valuable annotation on same subject, see 51 Am. St. Rep. 410.

of action cannot be introduced by amendment—cannot be accepted. . . . All that can be required, therefore (to use the language of Mr. Pomeroy), is that 'a wholly different cause of action' shall not be introduced; or as said by the court in *Shields v. Barrow*²⁷ that 'a complainant is not at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment': or, as expressed by this court in an early case, the matter of the amendment must not be 'entirely foreign to the original complaint.'²⁸ The theoretical rule that amendments cannot be permitted which introduce a new and different cause of action has been so often violated, and the violations acquiesced in by the appellate court, under the guise of a liberal construction of the code provision on the subject that it is impossible to state whether it will ultimately lay aside all limitations on the subject, or rest upon the reasonable and salutary line of demarcation suggested in the above-quoted opinion.²⁹ But it is obvious that if no definite halting place is found and occupied by the courts, all the rules of limitation as recognized rules of practice will become entirely antiquated, as in New York.³⁰

§ 109. Distinction between changing remedy and changing cause of action.

After considerable controversy and some judicial inconsistency manifested in decisions, it has been recently settled in

²⁷ *Supra*.

²⁸ Citing *Nevada County etc. Canal Co. v. Kidd*, 28 Cal. 681.

²⁹ In *Heilbron v. Heinlin*, 72 Cal. 376, 14 Pac. 24, the complaint was amended so as to describe a different tract of land from that described in the original complaint. In *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673, the case was changed from an action at law to a case in equity. In *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100, the change allowed was from an action on a special contract to an action on a quantum meruit. In *Castagnino v. Balletta*, 82 Cal. 256, 23 Pac. 127, the change was from an action on a mechanic's lien to an action on the special contract, or in assumpsit. In *Bogart v. Crosby*, 80 Cal. 195, 22 Pac. 84, the principal debtors, who had been omitted from the original complaint, were brought in by amendment. See, also, *Louvall v. Gridley*, 70 Cal. 510, 11 Pac. 777.

³⁰ See *Brown v. Leigh*, 12 Abb. Pr., N. S., 193, and cases cited; *Pomeroy on Code Pleadings*, § 546, p. 649, note 1.

§ 110. Same—Where new facts arise pending action.

Another limitation to the power of amendment, excess of which will be ground for reversal or new trial, rests upon the same salutary rule against changing the cause of action, and relates to occurrences subsequent to filing the original complaint. If to allege these would create inconsistency with the prior allegations and call for a different character of relief, such amendment is not permissible. Where, however, the

§ 453. Applying these definitions to the case at bar, it is clear that the cause of action set up in the original, and that set up in the amended complaint, was simply the obligation sought to be enforced—that is to say, the obligation to pay the money agreed to be paid—and that the only change that took place was in the remedy by which it was sought to enforce the obligation.

“This was the view taken in *Lackner v. Turnbull*, 7 Wis. 105 (affirmed in *Ball v. McGeoch*, 78 Wis. 359, 47 N. W. 610), where the original complaint was in assumpsit for work and labor, and the plaintiff was permitted to set up in an amended complaint a mechanic’s lien, the court saying: ‘We do not think that, in strictness, the amendment which was made in this case did not change the cause of action. It only changed the remedy; . . . but the “cause of action,” or, in other words, the labor performed and materials furnished (and it should be added, the corresponding obligation) were the same, whether the plaintiff proceeded under the original or amended complaint. By amending his complaint he was enabled to obtain relief, which he would not have been entitled to under the original complaint, but the “cause of action” was not changed by the amendment.’ In the present case, the cause of action was the obligation to pay the note, to which the mortgage was merely an incident: *Storch v. McCain*, 85 Cal. 307, 24 Pac. 639. The original complaint was defective, only by reason of failure to set up the mortgage, which, by a technical, statutory rule, was necessary. The amendment simply cured this defect, and the effect of the judgment was simply to give to the plaintiff what he originally demanded, and some additional relief, which, though necessary under the statute, was of no value. The case, therefore, comes within the rule. Nor is this decision in conflict with *Ramirez v. Murray*, 5 Cal. 222, and *Hackett v. Bank of California*, 57 Cal. 335, cited by appellant’s counsel. These cases did not refer to amendments under section 472 or section 473 of the Code of Civil Procedure, but to amendments at the trial for variance, which are governed by a different rule: Code Civ. Proc., §§ 470, 471; Practice Act, 71, 579. Nor is the cause of action here changed from tort to contract, or vice versa, as in those cases.”

cause of action would not be thereby changed, the new facts may be brought in by way of supplemental pleading.³²

A common case for the filing of a supplemental complaint is where an increase of damages occurs after the filing of an original complaint. In a case of that kind the supreme court

³² Cal. Code Civ. Proc., § 464. An interesting account of the policy of this section, and the change wrought by it, was given by the court (per McKee, J.), in *Harding v. Minear*, 54 Cal. 502, 504, as follows: "Section 464 of the Code of Civil Procedure declares that the plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer. Construing the section of the New York code applicable to this subject, the courts of that state have decided that the section was intended as a substitute for the former practice in actions at law of a plea puis darrein continuance. In *Hoyt v. Sheldon*, 4 Abb. Pr. 59, it was said that a supplemental answer shall be given in actions at law. In all cases in which a plea puis darrein continuance could have been put in as a matter of right: *Garner v. Hannab*, 6 Duer. 262; *Slauson v. Englehart*, 34 Barb. 198; *Bate v. Fellows*, 4 Bosw. 638.

"It was a practice in the common-law courts, after issue joined in an action, to give a day for the parties to appear in court, by an entry upon the record. This was called the continuance, because thereby the proceedings were continued without interruption from one adjournment to another: 3 Blackstone's Commentaries, 316. In progress of law, the entry on the record became mere matter of form, and might be made at any time, to make the record complete; and, subsequently, by an act of parliament, it became unnecessary to make entry of the continuances at all. But if a new matter of defense arose in a case after issue joined, and between the last continuance and the day set for the reappearance of the parties, the defendant was entitled, on the day for reappearance, to plead it as a matter which had happened after the last continuance, or—as the practice was modified by subsequent legislation—after the last pleading. The effect of such a plea, when pleaded, was not to impugn the right of action altogether, but only the right of maintaining it; i. e., since the period when matter of defense arose. The plea itself was considered as a waiver of all previous pleas, and the cause of action was admitted to the same extent as if no other defense had been made, but that contained in such plea: *Wallace v. McConnell*, 13 Pet. 136; *Yeaton v. Lynn*, 5 Pet. 223; *Spafford v. Woodruff*, 2 McLean, 191, Fed. Cas. No. 13,198.

"But the plea had to be allowed by the court. It was in the breasts of the judge at nisi prius whether he would accept it or not;

of Nevada said: "All the facts alleged in answers occurred after the original answer spondent could not, at that time, have known were all consistent with, and in aid of, the

therefore, it was necessary for the party to move judge that it was a true plea; Bacon's Abridgment, *Abbot v. Rugelsby*, 26 Car. 11, cited in *Bunton v. Bunton*, 250, it was held that he that offers a plea puis at the nisi prius must prove it there; for unless to the judge that it is a true plea, it is in his discretion will allow it or not, but may proceed to try *Hawkins v. Moore*, Cro. Car. 261, it is said 'receivable at the discretion of the justices, if verity in it. That practice was followed in the until the time of the codes. Say the court, in *1 Johns.* 249: It rests in the discretion of the court a plea, or not, even after more than one continuance time that the matter of the plea arose, and the court and this discretion will be governed by circumstances which cannot appear on the face of the plea. *Smith*, 50 Me., it is said: 'Whether the defendant to plead puis darrein continuance is a matter of court. The exercise of this discretion is never refused, also, *Rowell v. Hayden*, 40 Me. 586; *Wilson & R.* 238; *Lyon v. Marelay*, 1 Watts, 261; *Juff* 240. This discretion could not be invoked until been served, and then it was exercised on a motion. Bacon's Abridgment, 688; *Morgan v. Dwyer*, 10

"But the codes produced a change in the name of the plea, so that now, instead of filing a supplemental answer—as a matter of course, has been served to set it aside, application must be made, on motion, or order to show cause, for leave. The right to file a supplemental answer is, therefore, a positive right, but is made to depend on the discretion of the court in the exercise of a legal discretion. And, say of New York, the court must grant leave, unless show a case in which the court may exercise discretion in granting or withholding leave. . . . The application refused if the new defense, although legal, is ineffectual. *Swan*, 46 N. Y. 200; *Holyoke v. Adams*, 59 N. Y.

"Whether the word 'may' used in section 4 appears not to have been decided in California, provision in New York the court, in *Drought v. Drought*, 56, held as follows: 'When the facts asked to

original answer. They did not bring into the case any new cause of action, or any controversy that was not, in fact, included in the issue originally made. Under such circumstances, supplemental pleadings should be allowed."³³ But the irregularity of bringing in such new facts by amendment rather than by supplemental pleading is waived if not objected to in proper time.³⁴

§ 111. Same—Error herein, how reached.

Where the party against whom an amendment is allowed changing the cause of action, answers, or otherwise formally recognizes the regularity and sufficiency of the amended pleading, he cannot afterward object.³⁵ The error of the court in

pleaded in a supplemental answer, go to divest the plaintiff of the right to maintain the action, and transfer the cause of action to another, who had received satisfaction for the demand involved in it, it is the duty of the court to grant the motion. The word "may" in such a case, means "must"; and it will make no difference whether the motion be made at the earliest day or not. The facts amount to an entire satisfaction of the cause of action, and whenever pleaded and established, they utterly extinguish the plaintiff's right to prosecute it." See *Seehorn v. Big Meadows etc. Road Co.*, 60 Cal. 240, 250. To same effect, *Medbury v. Swan*, 46 N. Y. 200; *Holyoke v. Adams*, 59 N. Y. 233.

³³ *Buckley v. Buckley*, 12 Nev. 423, 434. See, also, *Graves v. Niles*, How. Ch. (Mich.), 333; *Ramey v. Green*, 18 Ala. 771; *Watson v. Thibon*, 17 Abb. Pr. 184; *Hoyt v. Sheldon*, 4 Abb. Pr. 59; *Rundle v. Little*, 6 Ad. & E., N. S., 176; *Boyd v. Weeks*, 2 Denio, 321; 43 Am. Dec. 749; *Bristol Mfg. Co. v. Gridley*, 28 Conn. 212.

³⁴ *Von Maren v. Johnson*, 15 Cal. 308, in an opinion upon petition for rehearing. In *McMinn v. O'Connor*, 27 Cal. 246, the same rule was applied to a supplemental answer; and to same effect, in *Moss v. Shear*, 30 Cal. 474; also, see note to 50 Am. St. Rep. 739, on jurisdiction over new parties.

³⁵ *Witkowski v. Heron*, 82 Cal. 604, 23 Pac. 132; *Cox v. Western Pac. R. R. Co.*, 47 Cal. 90; *Secor v. Law*, 9 Bosw. 163. If, by amendment, a plaintiff introduce a new cause of action, without abandoning the original, and they be such as might have been originally joined, the proper course is to move to strike out the amended count; but if the amended complaint contains a new cause of action which could not have been originally joined with the original cause of action, objection must be taken by special demurrer: *Cox v. Western Pac. R. R. Co.*, 47 Cal. 87, 90.

cause of action shown by the evidence is not the cause of action stated in the complaint. This could only be corrected by an amendment to the complaint, which could only be made by leave of the court. In passing upon an application for leave to amend, the controlling principle must be, whether the amendment is in furtherance of justice. And where, as here, the demand is unconscionable (being for part of a brokerage of seven thousand six hundred dollars for obtaining a loan of four thousand dollars for four months), we think that leave to amend should be refused. A party who seeks to enforce a liability like that must stand upon his legal rights. The court should not interpose its discretion to save such a case." In an early case⁴¹ it was held that a defendant should not be permitted to amend his answer to allow him to set up the statute of limitations. But the court in that case and in subsequent decisions conceded the matter to be within the exclusive discretion of the trial court.⁴² And if plaintiff amend his com-

⁴¹ *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348.

⁴² See *Stuart v. Lander*, 16 Cal. 372, 76 Am. Dec. 538; *Morton v. Bartelling*, 69 Cal. 306. In the case of *Robinson v. Smith*, 14 Cal. 254, two defendants filed a joint plea of the statute of limitations, and the plea being held bad as to one defendant, the court on the trial permitted the other defendant to file a separate plea of the statute on appeal. Held, this act was in the discretion of the court, and no abuse of its power. In *De Uprey v. De Uprey*, 24 Cal. 352; *Brown v. Martin*, 25 Cal. 82, and *Farwell v. Jackson*, 28 Cal. 105, it is decided that when the statute of limitations is raised by demurrer, the demurrer must state the objection. In the following cases it was decided that the statute of limitations must be raised in some form in the court below, either by answer or demurrer: *McDonald v. Bear River Co.*, 13 Cal. 221; *Gratten v. Wiggins*, 23 Cal. 16; *Brown v. Martin*, 25 Cal. 82; *People v. Broadway Wharf Co.*, 31 Cal. 33; *Vassault v. Seitz*, 31 Cal. 225. In *Kraft v. Greathouse*, 1 Idaho, 254, 258, after review of authorities the court said: "From these decisions and the decisions in New York and other states, and the authorities laid down in the text-books, we must hold that the statutes of limitations is a personal privilege which goes to the remedy, and not the right. The defendant may plead it or waive it. If he fails to plead it in any form, he thereby waives it, and he cannot take advantage of his waiver in this court. If for any excusable neglect the defendant allowed judgment to be taken against him in the court below, his remedy was in that court under the sixty-eighth section of the Practice Act. If he had offered to plead

plaint, thus entitling the defendant to answer the amended complaint as matter of right, the above rule has no application, and he may insert a plea of the statute of limitations, although that be his only amendment. In *Morton v. Bartning*⁴³ the plaintiff amended the complaint at the trial by the setting up an allegation of an oral, in addition to the allegation of a written, promise on the part of the defendant. Thereupon the defendant asked leave to amend his answer by pleading the statute of limitations, which the court refused. Plaintiffs proved an oral agreement, but failed to prove a written promise, and the court so found. The court granted a new trial for this error, and from the order granting a new trial plaintiff appealed. The supreme court affirmed the order, remarking that the general rule that where a party goes to trial without pleading the statute of limitations he will be deemed to have elected to stand upon the other defenses, and will not be permitted to amend by adding the plea, had no application to the case.

§ 114. Amendment not allowed to give unfair advantage.

Leave to amend should not be given where it would give a party an unfair advantage in the litigation.⁴⁴ A party will not be permitted, after an action has progressed for a considerable period upon a given theory deducible from an admission of an important fact in a verified answer—for instance, at a second trial—to change, by amendment, such sworn admission into a denial.⁴⁵ On the same principle, an amendment at

the statute of limitations, and his offer had been refused, it might be a good ground to come to this court. But such questions must be first raised in the court below. It is true, in early days courts were adverse to pleading statutes of limitations, and they often held very rigidly, but the rule has been very much relaxed in modern courts, and, we think, with good effect. What we do hold is that the statute of limitations must be pleaded either by answer or demurrer, and that question must be presented to the court below.”

⁴³ 68 Cal. 306, 9 Pac. 146.

⁴⁴ *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647.

⁴⁵ *Spanagel v. Reay*, 47 Cal. 608. See, also, *Bank of Woodland v. Herron*, 122 Cal. 107, 54 Pac. 537. The last case just cited was one in which the action of the lower court in refusing an amendment was upheld, but the court gave a very clear exposition of the

ment of the answer setting up the acceptance of benefits under the will by the plaintiff as an estoppel.⁴⁶ But the court intimated that the party might entitle himself to leave to so amend in such case by showing some good reason for not applying earlier for leave to amend. But whether such inconsistent and contradictory amendments shall be permitted is conceded by the appellate court to pertain to the discretionary power of the trial judge.⁴⁷ There is no doubt that upon a very slight showing of prejudice resulting from allowing such an amendment the supreme court would interfere. While to permit it is not error *per se*, yet if, on the prior issues, the other party had proceeded so far that he could not meet the new issue so tendered without peril or substantial loss, the law of estoppel should be held to apply.

§ 115. Diligence required.

Where leave to amend is sought, as in all other cases calling for a favorable exercise of the court's discretion, it should appear that the party applying has not been guilty of laches in seeking leave; for unreasonable delay may constitute a good reason for refusing it. Accordingly, in a case where there was no intimation of excuse for the delay in presenting amendments, long before allowed, until after the case was declared substantially closed, it was held not an abuse of discretion to refuse to permit them to be made.⁴⁸ But, of course, the propriety of allowing amendments at that stage will depend largely upon their character.

burne v. Daly, 76 Cal. 355, 18 Pac. 403; *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Dorn v. Baker*, 98 Cal. 206, 31 Pac. 37; *Siskiyou County v. Gamlich*, 110 Cal. 94, 42 Pac. 468; *Pacific Rolling Mill v. Bear Valley Irr. Co.*, 120 Cal. 94, 65 Am. St. Rep. 158, 52 Pac. 136.

⁴⁶ *In re Redfield's Estate*, 116 Cal. 637, 48 Pac. 794.

⁴⁷ *Harney v. Corcoran*, 60 Cal. 314.

⁴⁸ *Emeric v. Alvarado*, 90 Cal. 444, 484, 27 Pac. 356. The same principle was applied in an action upon a promissory note—the case having been at issue for nearly two years upon the plea of payment—the defense upon affidavits moved for leave to file an amended answer, alleging want of consideration. It was held that the lower court properly exercised its discretion in refusing to allow this amendment: *Page v. Williams*, 54 Cal. 562.

determined. From the course pursued, it is apparent that no trial has been had upon the only question about which there is any substantial controversy. That such has been the case is not the unpardonable fault of the defendant. On the contrary, the fault is primarily with the plaintiff. Had his allegation been what it ought to have been, it is more than probable that the defendant's denial would have been all that it ought to have been. The defective denial was invited and provoked by the defective allegation. The chief fault of the defendant was in the attempt to deny the allegation at all, instead of treating it as fatally defective, which he might have safely done. Had the defendant pursued this course, the court would doubtless have allowed the plaintiff to amend, upon a discovery of the defect, but the defendant would then have had a direct instead of an indirect averment to meet, and could have met it directly instead of indirectly, as he was in a measure forced to do. Upon the return of the case to the court below, both parties will be allowed to amend their pleadings in the particular noticed, and in other respects, if they so desire." The general rules governing amendments at the trial have been often reiterated in the decisions.

It is no valid objection to an amendment that it is proposed at or during the trial, a good reason for not proposing it sooner appearing or being shown; and it is error not to permit it if it be necessary for the purposes of justice.⁵³ Especially should such amendment be permitted, at any stage of the trial, when necessary to supply a mere defect or omission.⁵⁴ But when amendments are proposed at or on the eve of the trial, and the ruling comes before the appellate court, much will be

⁵³ *Farmers' Nat. Gold Bank v. Stover*, 60 Cal. 388; see, also, *Riverside Land Co. v. Jensen*, 73 Cal. 550, 553, 15 Pac. 131, as to the filing of an amended complaint; *Walsh v. McKeen*, 75 Cal. 521, 17 Pac. 673; *Sharon v. Sharon*, 77 Cal. 105, 19 Pac. 230; *Chatfield v. Williams*, 85 Cal. 521, 24 Pac. 839, applying principle to amendment of answer.

⁵⁴ *Gavitt v. Doub*, 23 Cal. 78. Followed in *Buddee v. Spangler*, 12 Colo. 223, 20 Pac. 760, holding it to be discretionary in the court to allow amendment of answer, though the facts contained therein were known to defendant before filing a former amended answer.

based thereon; that after such amendment the petition became a new petition, and proceedings de novo must be had.⁶¹

§ 120. Amendment of prayer.

Upon application made in due time the prayer to a complaint or cross-complaint may be amended as well as any other part of a pleading.⁶² Often the form as well as the substance of the prayer is of significant importance, and may determine the nature of the action. For instance, where the facts alleged in the complaint may constitute two or more different causes of action, and authorize different judgments.⁶³ But the rule that the discretion to allow amendments should only be exercised in furtherance of justice prohibits an amendment to the prayer in a manner and at a stage that would deprive the defendant of important rights resulting from prior proceedings in the case, and give a plaintiff relief not warranted by the verdict of a jury or findings of the court. This principle is well illustrated and explained in *Nevada County etc. Co. v. Kidd*.⁶⁴ The case as presented in the record cannot be here stated. The court said: "The complaint did particularly specify the relief demanded, as here required, and that relief was a judgment for damages, the amount of which was stated, and the relief demanded was strictly in accordance with the theory of the case as stated. Having been thus specific in stating the relief demanded, and the relief being appropriate, the defendants were entitled to suppose the case would be tried in accordance with the theory of the case thus indicated by the facts as stated, and the relief prayed. They might make a very different defense to an action to recover the possession of valuable property, from that which they would in an action for a trespass, since there might be a cause of action for a trespass, but none at the time of commencing the suit for possession. Other evidence of a different character to different facts would be necessary on the issue of the right to possession at the time of the commence-

⁶¹ *Gharky v. Werner*, 66 Cal. 388, 5 Pac. 676.

⁶² *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 678.

⁶³ *People v. Mier*, 24 Cal. 61; *Arrington v. Liscom*, 34 Cal. 375; *Morrison v. Bowman*, 29 Cal. 354.

⁶⁴ 37 Cal. 282.

ings which raised no issue of fraud on either side. During the trial the defendant introduced evidence of fraud to annul a settlement made by the husband (defendant) upon the wife (plaintiff) at the date of their marriage. To this evidence plaintiff offered no denial, nor did her attorney interpose any objection, for the reason that he considered it too entirely irrelevant to require rebuttal or objection. Subsequently, and after submission, the defendant was permitted to file an amended cross-complaint containing allegations of fraud by which the settlement was procured. The court found that these allegations of fraud were sustained by the evidence, and entered judgment accordingly. The appeal was from this judgment and from an order refusing a new trial. Although the report of the case says nothing about notice of the application to file this amended pleading, it is fairly inferable that it was filed after notice, since, upon its being filed, plaintiff moved to strike out the evidence upon which its allegations of fraud were based. It is clear that counsel for plaintiff here pursued a mistaken course, which is best shown by the language of the supreme court in passing upon the point, as follows: "The testimony was all in, and it was proper that the pleadings be amended so as to conform to it. But it is said that the plaintiff, did not, in giving her testimony, deny defendant's charges of fraud, because they were not based on any issue in the case, and that by permitting the amendment and refusing to strike out the portions of defendant's testimony objected to, the court prevented her having that fair and impartial trial to which she was entitled. If it be true that the plaintiff could and would have denied any of the defendant's charges which she did not deny, provided the amended cross-complaint had been on file at the time, then she might, and we think should, have asked to have the case reopened for that purpose. If she had done so, doubtless her request would have been granted. In the absence of such a request, we see no reversible error in ruling of the court."

Any error in a refusal of the court to allow an amendment to an answer is cured when the facts to be covered by the amendment are subsequently admitted in evidence and considered both in the lower court and on appeal. Thus in *Pacific*

uniformly refused to disturb a ruling on such questions, unless it is shown that the discretion was abused, and the ruling arbitrary." An important reason why such important concession is made to the lower court in passing upon applications to continue, is the facility with which parties and their attorneys may simulate causes or pretexts for continuances. Such applications are carefully scrutinized for evidences of bad faith, And if the facts and their circumstances cast suspicion on the good faith of the party, and are such as to induce a belief that the application is intended only for delay, the court will not abuse its discretion in denying it.³

§ 125. Discretion extends to every stage of the proceeding.

The judge of a trial court has discretionary power, after having heard the testimony and argument of counsel in a case and announced orally from the bench his finding on the issues in favor of one or the other of the parties, to reopen or to con-

to see George Cain, one of the defendants in the case, and ascertain what he should testify to if called at the trial; and it is shown by the affidavit of David, and that of counsel, that the former did see Cain as requested and, after speaking to him upon the subject, reported to counsel for the bank that Cain had stated that the instruments were bona fide, and just what they purported to be, and for that reason, and that alone, the depositions of the Wheelers, both of whom resided outside of the state, were not taken. George Cain in an affidavit filed in the cause, denied making such statement to David; but under the circumstances of the case, and considering that it was a suit in equity, we think the learned trial court should at least have granted leave to take the depositions, as it must have appeared at that stage of the proceedings that the absolute truth in regard to the intent of the parties to the instruments could not well be ascertained without the testimony of the Wheelers. We are, of course, not unmindful of the fact that the court was clothed with a legal discretion in the matter; and although, as we have said, we think the motion should have been granted, we would not, however, be disposed to reverse the judgment upon that ground alone. Upon the whole case, we are of the opinion that there should be a new trial, and the judgment is therefore, reversed, and the cause remanded to the superior court for further proceedings in accordance with this opinion."

³ People v. Mortimer, 46 Cal. 114.

tinue the case.⁴ It follows, of course, that the court may refuse a postponement after the parties have announced ready and entered upon the trial, especially where no sufficient cause is shown for not making the application before the trial.⁵ And while the court has the undoubted power to continue a civil action after the commencement of the trial, and even, in an exceptional case, after the oral announcement of its decision, it is doubtful if it has any power to grant a formal continuance of a criminal case, on application of the prosecution, after the jury has been sworn and the trial entered upon. It certainly has no power to grant a postponement for a considerable period, during which the jury is allowed to separate, whatever the cause.⁶ To constitute abuse of discretion in refusing to grant a continuance after the evidence and argument have closed requires a very strong showing.⁷ The duty of counsel and court respectively are clearly indicated in *People v. Logan*,⁸ where the court said: "After the jury was impaneled and before any evidence was introduced, defendant's counsel asked for a continuance, upon the ground that Mrs. Logan, the wife, was sick and unable to be present at the trial. It fur-

⁴ *Hastings v. Hastings*, 31 Cal. 95. Further as to court's discretionary power herein, see *Reynolds v. Corbus* (Idaho), 63 Pac. 884, *Nebraska etc. Co. v. Burris*, 10 S. Dak. 430, 73 N. W. 919; *Saastad v. Okeson* (S. Dak.), 92 N. W. 1072; *Gaines v. White*, 1 S. Dak. 437, 47 N. W. 524; *Stone v. Railway Co.*, 3 S. Dak. 330, 53 N. W. 189. Same power, whether application be made before or at the trial: *Billingsley v. Hiles*, 6 S. Dak. 445, 61 N. W. 687; *Gotzian etc. Co. v. McCollum*, 8 S. Dak. 186, 65 N. W. 1068.

⁵ *People v. Beam*, 66 Cal. 394, 5 Pac. 677. The discretionary power of the trial court extends to brief postponements; and the court may refuse to adjourn the trial from the middle of the afternoon until the next day, where the circumstances show no abuse of discretion: *People v. Shaw*, 111 Cal. 171, 43 Pac. 593.

⁶ *People v. Dinsmore*, 102 Cal. 381, 36 Pac. 661.

⁷ See *Hastings v. Hastings*, 31 Cal. 95, where it was held a sufficient showing was made. See, also, *People v. Logan*, 123 Cal. 414, 56 Pac. 56.

⁸ 123 Cal. 414, 416, 56 Pac. 56. For an actual illustration where defendant was granted a new trial by the appellate court for abuse of discretion in granting to the prosecution a continuance, see *People v. Dinsmore*, 102 Cal. 381, 36 Pac. 661.

the court that the attorney of record, party or principal witness is actually engaged in attendance upon a session of the legislature of this state, as a member thereof." It is evident from the expression of the supreme court in the case of *People v. Goldensen*,¹⁷ that in view of the provisions of section 1032 of the Penal Code, this constitutes no cause for a continuance in a criminal case. At any rate, as was held in that case, there cannot be a continuance, for the absence of counsel as a member of the legislature, unless it be shown that his employment as attorney of record dates prior to the commencement of the session of the legislature.

§ 132. Change of counsel.

Where an attorney has just come into a criminal case, as sole counsel for the defendant, he is clearly entitled to a reasonable time for preparation, and it would be an abuse of discretion not to allow it. But in such case, it would be a good answer to the application on the part of the defendant that he had not been prejudiced by the court's ruling. Accordingly, where it appeared, after an unsuccessful application without any showing by affidavit, for a continuance, in a murder case, that defendant's counsel practically had a continuance of five days during the impanelment of the jury, and before the trial begun, to prepare for the trial upon its merits, it was held that the court did not abuse its discretion in refusing to grant a continuance.¹⁸

§ 133. Grounds for—Absence of witness—Requisites of affidavit—Generally.

The ground upon which applications are most frequently made for continuance, or postponement, is the absence of witnesses. The only form in which the court can consider the application presented on that ground, is that of affidavits, or an affidavit, unless this legal requirement be waived by the opposite party. For this reason the whole subject is properly treated by considering the essential features of such affidavits.

¹⁷ 76 Cal. 328, 342, 19 Pac. 161.

¹⁸ *People v. Ward*, 105 Cal. 335, 38 Pac. 945.

Before proceeding to a consideration of the various parts of the affidavit in detail it is proper to summarize them. The essential requisites of such affidavits are as follows: The names of the absent witnesses and what it is expected to prove by them should be stated.¹⁹ It must also be shown that the evidence is material;²⁰ that the evidence or attendance of the absent witness could probably be procured, if a continuance were granted,²¹ that the same facts cannot be proved by other wit-

¹⁹ *Carey v. Philadelphia etc. Co.*, 33 Cal. 693; *People v. Ah Fat*, 48 Cal. 62; *Kern Valley Bank v. Chester*, 55 Cal. 49, 51.

²⁰ *Harper v. Lamping*, 33 Cal. 641; *Kern Valley Bank v. Chester*, 55 Cal. 49; *People v. Mellon*, 40 Cal. 648; *Storeh v. McCain*, 85 Cal. 304, 24 Pac. 639; *Cohn v. Brownstone*, 93 Cal. 362, 28 Pac. 953. Affidavit for continuance at the trial, on the ground of surprise, should clearly state in what the surprise consists: *Hood v. Fay*, 15 S. Dak. 84, 87 N. W. 528. See, also, *Stone v. Chicago etc. Ry. Co.*, 3 S. Dak. 335, 53 N. W. 189, holding further as to facts which must be shown. See valuable note to *Stevenson v. Sherwood*, 74 Am. Dec. 145.

²¹ *People v. Wade*, 118 Cal. 673, 50 Pac. 841, 33 Cal. 641; *People v. Ah Fat*, 48 Cal. 62; *People v. Lewis*, 84 Cal. 401, 1 Pac. 490; *Carey v. Philadelphia etc. Co.*, 33 Cal. 693; *People v. Cleveland*, 49 Cal. 580; *People v. Ah Yute*, 53 Cal. 613. In the first case cited the court said: "Each of the said affidavits named a person who, it was said, would be a material witness for the defense, and stated what was expected to be proved by the witness. It then stated that a subpoena for the witness had been issued and placed in the hands of the sheriff for service, but returned, showing by the return indorsed thereon that after due search and diligent inquiry the officer had been unable to find the said witness in this county. In six of the affidavits the affiant stated that he had personally made search and diligent inquiry for the witnesses named therein, but such search had been unsuccessful. In one of the affidavits the affiant stated that he was informed and believed that the witness named therein was in the republic of Mexico. The whereabouts of no one of the persons named, except the one who was somewhere in Mexico, is shown, and it does not appear that the attendance of any one of them would or could be procured within any reasonable time. Under such circumstances, it cannot be said that the court abused its discretion in denying the motion."

With respect to this feature of the affidavit and its essentials, the language of the court in *State v. O'Neil*, 13 Or. 185, 9 Pac. 284, is very clear and pointed as follows: "The affidavit states 'that

§ 134. Grounds for—Absence of witness—Requisites of affidavit—Materiality—Cumulative may be material.

Although an application setting forth cumulative evidence, is not looked upon with favor, still the fact that it is such constitutes no legal objection to the application. A continuance will not ordinarily be granted on account of the absence of such evidence unless it is of sufficient importance in view of the evidence at hand, that it might be decisive of the point to which it is proposed to introduce it, for instance, where the only evidence at hand is that of an interested party. In *People v. Ah Lee Doon*²⁶ the court said: "The affidavit filed by defendant in support of his motion for a continuance showed that Lee Ching would testify to the same version of this quarrel and assault that the defendant gave. It is not denied that his evidence would have been material, but the attorney general contends that as it would have been merely cumulative, to that of the defendant, the absence of the witness was not a ground for a continuance. It is true that a trial will not be postponed ordinarily for the purpose of obtaining cumulative evidence, but this rule, which is by no means absolute, has no application to a case in which the only evidence at hand is that of an interested party, especially when he is defendant under an indictment for murder. The ruling of the court against a continuance cannot be sustained on the ground that the evidence was cumulative."

§ 135. Grounds for—Absence of Witness—Requisites of Affidavit—Inability to otherwise prove.

It is not sufficient to set forth that the absent witness is the only person by whom the party "expects" to prove the same facts. In *Pope v. Dalton*,²⁷ the court said: "But were it conceded to be otherwise, the affidavit does not show that the absent witnesses were the only persons by whom he could prove the same facts. He deposed that he had not at the time he made the affidavit any other witnesses by whom he expected to, prove the same state of facts. This will not do. There may

²⁶ 97 Cal. 171, 177, 31 Pac. 933. See, also, *Jordan v. Schnerman* (Ariz.), 53 Pac. 579; *Taylor v. Nevada-California etc. Co.* (Nev.), 69 Pac. 858.

²⁷ 31 Cal. 218, 219.

have been and probably were many persons who have proved the same facts, and he may have procured their attendance or otherwise procured their attendance hence he could truly say he had no other persons named by whom he expected to prove the

§ 136. Grounds for—Absence of Witness—Diligence generally.

The allegation of use of diligence shows either of a conclusion of law or an ultimate fact that a party has used all the diligence in the effort to procure the evidence. It should be shown to the court that the diligence consisted, whether by exhausting the proper legal means or otherwise.²⁸ The party must show that use of legal means to procure the desired evidence is by no means sufficient. The requirements of the law. The kind of diligence required where the absent evidence consists of a file in a public office is thus explained in *States*:²⁹ "The defendants were required to exercise reasonable diligence in their efforts to procure the evidence also that they had employed the necessary persons who had the custody of these vouchers and could furnish the transcript were beyond the reach of its process. It came the duty of the defendants to sue out subpoenas for their depositions, and to have attached thereto the required papers. This they failed to do. The vouchers and transcript, being under the control of the adverse party, it was their duty, on request, for the use of the defendants, to produce them. The defendants, for the sake of the argument, that these vouchers represented the government for this purpose, failed to pursue the proper method to attain the result. It is a settled rule that if documentary evidence

²⁸ *People v. Thompson*, 4 Cal. 238; *Benjamin*, 77 N. W. 605.

²⁹ 1 Idaho, 585. See *Stewart v. Sutherland*, 947, holding that no excuse shown for failure to produce the land office.

and under the control of a party to a suit, which is material to the adverse party, he cannot be required to produce it, except upon due notice. If such party has the evidence in his possession in court at the trial, notice upon the trial is sufficient; if not, then the notice must be served in time to enable him to produce it on the hearing of the case. In this case the defendants had no legal right to demand these vouchers of the accounting officers. They became a part of the records or files of the department as evidence of the claims which had been rejected, and as a proof of their invalidity, and could not, without detriment to the public service, be withdrawn from the office. The most that defendants could require were office copies of the papers as evidence."

Where evidence is in a party's own possession its absence is not excused on motion for continuance by showing that by inadvertence he is unable to procure it.³⁰ And it was held that a continuance was properly refused where by implication it appeared on the affidavit that the address of the absent witness was known two months previously to the trial, when the trial was set, and no effort was made to secure the testimony of the witness.³¹

§ 137. Grounds for—Absence of Witness—Requisites of Affidavit—Diligence in resorting to process.

If the absent witness be within reach of the process of the court, timely and diligent resort to the appropriate legal process must be shown, or in lieu thereof, facts must be stated which show satisfactorily that there was no time or opportunity for such resort, or that it would have been useless.³² The mere semblance of a resort to legal process, knowing that it will be unavailing to procure the attendance of the witness—for instance, where he resides in another county, and no order of court is obtained, but merely a subpoena issued and delivered to the sheriff of the county of the witness' residence—shows no diligence whatever.³³ The affidavit must show that the sub-

³⁰ *Kubland v. Sedgwick*, 17 Cal. 123.

³¹ *Tompkins v. Montgomery*, 123 Cal. 219, 55 Pac. 997.

³² *Kubland v. Sedgwick*, 17 Cal. 123.

³³ *People v. Williams*, 24 Cal. 31; *People v. Lampson*, 70 Cal. 204, 11 Pac. 593; *People v. Jenkins*, 56 Cal. 4.

poena was such that the witness was bound to obey. In *Lampson*,³⁴ the court said: "The affidavits failed to show that proper diligence was used to procure the attendance of the witness. No such subpoena as would compel the attendance of the witness was ever issued at all, and it does not appear that the sheriff of the city and county of San Francisco was furnished with the address of the witness, that he might serve the subpoena that was issued. It is provided by section 1330 of the Civil Code, that 'no person is obliged to attend as a witness before a court or magistrate out of the county where the witness resides or is served with the subpoena unless the judge of the court in which the offense is triable, or a justice of the peace, or a judge of the superior court, upon an affidavit of the district attorney or prosecutor, or of the defendant or counsel, stating that he believes the evidence of the witness material, and his attendance at the examination or trial of the case shall indorse on the subpoena an order for the attendance of the witness.'"

Where the affidavit alleges the absence of a material witness who has been subpoenaed, and fails to show the issuance of a subpoena, or attachment, it must also show, that he could not be reached by an attachment.³⁵

§ 138. Grounds for—Absence of Witness—Requisites of Affidavit—Diligence in procuring service of process.

It is not sufficient merely to procure the issuance of a subpoena and its delivery to a public officer. Diligence must be shown in endeavoring to have it served. And if service of a subpoena is claimed, it must appear that the service was such as to bind the witness to obey.³⁶

§ 139. Grounds for—Absence of Witness—Requisites of Affidavit—Diligence in obviating absence of witness by taking deposition.

Where a continuance is asked for the purpose of taking a deposition, the affidavit must show that the witness is absent, and that a continuance is necessary for the purpose of taking a deposition.

³⁴ 70 Cal. 204, 11 Pac. 593.

³⁵ *People v. Weaver*, 47 Cal. 106. Party must show that no subpoena was issued, or that remedy would be unavailing. See *Kubland v. Sedgwick*, 17 Cal. 123.

³⁶ *People v. Jocelyn*, 29 Cal. 362.

deposition of a witness, in addition to a showing of diligence, it must be shown that it is a case in which a deposition may be taken. Explicit provision is made in the Code of Civil Procedure of California,³⁷ for taking depositions in civil actions, and in the Penal Code,³⁸ for taking and preserving testimony by deposition in criminal cases. It will be seen that no provision is made for taking foreign depositions in criminal cases. The statute only allows depositions to be taken: "When a material witness for the defendant is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial."³⁹ And where in a civil action over one month was allowed to elapse between the joinder of issue and the time fixed for the trial, and no steps had been taken to obtain the deposition of a witness residing in another state, it was held that no diligence was shown.⁴⁰ But where there has been no lack of diligence, a continuance should be allowed to procure attendance of witnesses residing without the state whose attendance is prevented by sickness.⁴¹

§ 140. Grounds for—Absence of witness—Requisites of Affidavit—Probability of securing testimony in future.

The affidavit must show probability of procuring the evidence within a reasonable time,⁴² and the allegation of the affidavit is not sufficient if it merely state the fact generally. It should state facts from which the court may judge, as to such probability.⁴³

³⁷ § 2019 et seq.

³⁸ § 1335 et seq.

³⁹ Cal. Pen. Code, § 1336. See *People v. Francis*, 38 Cal. 183.

⁴⁰ *Pierson v. Holbrook*, 2 Cal. 598.

⁴¹ *Yori v. Cohn* (Nev.), 65 Pac. 945.

⁴² *People v. Wade*, 118 Cal. 672, 50 Pac. 841; *Shannon v. Consolidated etc. Co.*, 24 Wash. 119, 64 Pac. 169. Where more than a year had elapsed, during which the prosecution was also making search, no reasonable cause being shown by defendant to believe that further postponement would secure their attendance, a continuance was properly refused: *People v. Sanders*, 114 Cal. 216, 46 Pac. 153.

⁴³ *People v. Ah Yute*, 53 Cal. 613; *People v. Francis*, 38 Cal. 183.

therefore, a suit is commenced in that court upon a cause of action which is then pending before it in another suit, or which has already been carried into judgment, the procedure to be observed is the same as if the two actions were in a court with but a single judge before whom all causes therein were to be tried. If the defense of a pending suit, or the estoppel of a former judgment, is not pleaded when such defense is available to the defendant, he cannot, after an adverse judgment, avail himself of this defense which he neglected to plead when he had an opportunity to do so, any more than he could avail himself of any other defense which he had omitted to plead." It sometimes happens that the subject matter of the action is to some extent involved in other pending actions, so that the issues cannot be fully presented or the rights of the parties adjusted with certainty until the final determination of such other actions. Under such circumstances it is proper to grant a continuance upon application of either party for a reasonable period in order that complete justice may be ultimately done between the parties. Thus in the case of *Macomber v. Bigelow*,⁴⁸ the action was by an assignee of building contractors for reasonable value of services performed and materials furnished by them under a void building contract. It was pleaded in the answer and admitted at the trial that actions were pending for the foreclosure of liens in favor of subcontractors. It was held to be the duty of the court, under these circumstances, to continue the trial of the case, until the actions in favor of the subcontractors should be tried and determined in order to secure to the defendant the right of setoff of the amount of costs and attorneys' fees in such actions against the claim of the contractor, it being his duty to have paid his debts to the subcontractors, or to have defended the suits brought by them at his own expense.

An amendment by a party of his own pleading may be attended with circumstances entitling him to a continuance at the trial. But in such case there must be a very strong and full showing—one which will, among other matters, explain the delay in making the amendment and the causes for the absence

⁴⁸ 123 Cal. 532, 56 Pac. 449.

of evidence or witnesses to sustain the new issues raised by the amendment.⁴⁹

Continuances rendered necessary by amendments by the opposite party, are of common occurrence. Whether it will be an abuse of discretion to refuse a continuance, depends upon the extent and importance of the amendment and the fact of readiness or unreadiness to meet the changes wrought by the amendment. Of these matters much is conceded to the judgment and discretion of the trial court.⁵⁰ Where, in an action for rescission on the ground of fraud, the plaintiff, was allowed at the trial, to amend his complaint setting up an additional fraudulent representation, and the testimony of the only witness for the defendant who could disprove the allegation had been taken by deposition in another state before that issue had been raised, it was held error to refuse a continuance.⁵¹ In this case the supreme court, per Justice Mount, said: "At the trial plaintiff asked the court for leave to amend the complaint by inserting an allegation of fraud upon this ground; and, over the obligation of the defendant, the court, after denying the request for a continuance so as to give defendant an opportunity to meet this allegation, permitted the amendment and made a finding thereon. Under these circumstances the court should have denied the application to amend, or should have granted the continuance as requested."

§ 143. Admission by opposite party to avoid continuance.

Statutes are generally found which specify how the adverse party in civil actions may obviate the necessity of a continuance, though the showing therefor be sufficient, by admitting, subject to objections to admissibility, that the absent witness, if present, would give the testimony set forth in the affidavit. Section 595 of the Code of Civil Procedure of California, provides, among other things that, "the court may require the moving party, where application is made on account of the absence of

⁴⁹ See *Shultz v. McLean*, 109 Cal. 437, 42 Pac. 557, where the showing was held insufficient.

⁵⁰ *Montana Ore etc. Co. v. Boston etc. Min. Co.* (Mont.), 70 Pac. 1114.

⁵¹ *Eldridge v. Young America etc. Co.*, 27 Wash. 297, 67 Pac. 763.

the court denied the motion for a continuance. The testimony of Flint, as stated in the affidavit above alluded to, was competent and material upon the question involved in the finding last above mentioned, as that finding was based upon the alleged participation of Flint in the transaction, in which the note was made and delivered. The admission of the plaintiffs did not extend to all the matters which the defendants expected to prove by Flint. They did not admit that he would testify that he was unconnected with the note or with the direction of the business of the firm. The admission was not broad enough to cover all the facts, to which the defendants expected that Flint, if present at the trial, would testify, and the continuance should have been granted."

The above provision is inapplicable to criminal cases. The Penal Code contains no similar provision. Any such statute applicable to criminal cases would be clearly unconstitutional, as depriving the accused party of the right to be confronted by his own as well as the state's witnesses. Consequently, the offer of the prosecuting officer to admit that the witnesses, if present, would testify as alleged in the affidavit, does not warrant the court in denying the motion to postpone, if otherwise meritorious.⁵⁶ It appears, however, to have been held, that in Idaho, the prosecution can obviate a postponement by admitting that witness would swear as per affidavit if present.⁵⁷ and in *People v. Diaz*,⁵⁸ there is a dictum, or rather an intimation, that the prosecuting officer might have obviated a continuance by admitting the truth of the facts set forth in the affidavit. This question does not appear to have been directly raised in any subsequent California case.

There are conflicting authorities on the subject of how far the state can, by admissions, obviate continuances, some courts going so far as to hold that the same rule may be established by statute in criminal as in civil cases.⁵⁹ The court in *People*

⁵⁶ *People v. Diaz*, 6 Cal. 248.

⁵⁷ *Territory v. Guthrie*, 2 Idaho, 432, 17 Pac. 39.

⁵⁸ 6 Cal. 248.

⁵⁹ See *Pace v. Commonwealth*, 89 Ky. 208, 12 S. W. 271; *Territory v. Guthrie*, 2 Idaho, 432, 17 Pac. 39. The rule in Montana under a statute is different from that of most other states: See Mont.

Rev. Stats., § 244; *Territory v. Perkins*, 2 Mont. 470; *Territory v. Harding*, 6 Mont. 323, 331, 12 Pac. 750. In the latter case there is an able dissenting opinion by Justice Bach, in which he makes an able presentation of the authorities and of his views in support of the rule of *People v. Diaz*, 6 Cal. 248, saying (in part): "I am firmly of the opinion that the legislature assembly meant to provide, in the section referred to, what the act itself indicates, the practice upon motion; that it did not mean in those sections, or particularly by section 244 of the Civil Practice Act, to enumerate what should be causes for a continuance of a trial; and that it meant to leave such causes to the courts of justice, and merely declare, by section 244, that in one class of motions in civil cases the court should not exercise its discretion to grant a postponement. And in leaving such causes to the inherent power of the courts the legislative power acted wisely; for no such body could imagine the infinite variety of facts which would in certain cases constitute 'good cause shown' for a continuance. If this is the correct interpretation—and I am convinced that it is—if section 244 of the Civil Practice Act provides the practice, upon a motion for continuance, and not the cause for continuance, then it [section 244] does not become incorporated in the criminal practice act by virtue of section 270 of the latter act; and the second portion of section 244 of the former act, which takes away from the court the right to use its discretion in such motions on certain grounds in civil cases, does not take away or limit the discretion of the court upon any motion for a continuance in criminal cases. If I am wrong in my interpretation, if section 244 of the Civil Code is embodied in the Criminal Practice Act by virtue of section 270 of that act, then in no criminal case whatever can the court allow a continuance upon the ground of the absence of evidence when the adverse party (the territory) makes certain admissions; for the court has no discretion. It must refuse the motion. . . . By our statute (section 166, page 310), the time of the commission of the crime needs not to be proved as alleged in the indictment, except where it is 'an indispensable ingredient of the offense.' Following the rule laid down in the *Perkins* case, which takes away the discretion of the court to grant a continuance in all cases where the adverse party makes the admission specified in section 244 in any case of homicide, the prosecuting attorney could admit that witnesses would testify to the absence of the defendant from the place and at the time alleged in the indictment, and then he could completely destroy the defense of the accused by proving a time other than that alleged in the indictment, for time is not 'an indispensable ingredient of the offense' of homicide. I am of the opinion that in criminal cases of such a serious nature the accused should not be crowded to a trial; that he should be allowed time in which to procure his witnesses; that he should have time after having read the indictment, and before his plea, to pro-

v. Brown,⁶⁰ reversed the judgment on the ground that the admission by the district attorney was not as broad as the specification in the affidavit of facts to which the absent witness would testify. The court assumed, but did not, apparently, directly decide that the prosecution could deprive the defendant of the constitutional right to confront the witnesses by admitting the truth of all the facts set forth in the affidavit.

It is clear that if a continuance is not insisted upon, in order to obtain the attendance of the witness, or if the offer of the prosecution to admit that the witness, if present, would testify as set forth in the affidavit is accepted, the defendant cannot claim the benefit of an admission of the truth of the facts so set forth. In *People v. Harlan*,⁶¹ an affidavit made by the defendant for a continuance was filed at the commencement of the trial, in which what the defendant expected to

cure witnesses to meet the allegations of that indictment; and in all criminal cases the court should be allowed to use its discretion in granting or refusing a continuance, as is contemplated by the use of the word 'may' in section 270 of the Criminal Practice Act, and which the court below was prohibited from doing by the rule laid down in the Perkins case; and in cases where alibi is a defense, the first application for a continuance should be granted, unless the court below is firmly convinced that the motion is made in bad faith." The proper rule for disposing of applications for continuances for absent witnesses in criminal cases, was undoubtedly those stated in *People v. Diaz*, *supra*. See, also, *Graham v. State*, 50 Ark. 167, 6 S. W. 721, to substantially the same effect, notwithstanding a statute permitting the admission that a witness would testify according to the statement in the application for continuance; *Newton v. State*, 21 Fla. 70, where the same rules as to admissions by the prosecutor was applied to the issuing of a commission to take testimony; *Pace v. Commonwealth*, 89 Ky. 208, 12 S. W. 271, which holds that a statute is not unconstitutional which denies the right to a continuance if the prosecutor will admit the truth of the facts stated in the affidavit as those which the absent witness would make; *People v. Sligh*, 48 Mich. 57, 11 N. W. 782, as intimating that the constitutional rule forbids secondary evidence to supply the testimony of an absent witness in a criminal case.

⁶⁰ 54 Cal. 243.

⁶¹ 133 Cal. 16, 23, 65 Pac. 9.

prove by a certain witness was set out, and the prosecution admitted "that Ernest Barada would, if present, testify to the facts set out in the affidavits of Charles Harlan"; to which counsel for defendant replied, "Under such admission I am willing to proceed"; and the trial went on. It was held that an instruction drawn on the theory that the testimony of the witness was conceded and admitted to be true by the prosecution, was properly rejected by the court, because no such concession was made by the prosecution.

§ 144. Party need not submit to test of good faith.

A party having presented a case entitling him to a continuance, and having made a showing upon which the court has erroneously refused the application, is not bound to submit to any test of the good faith of the application or of the truth of the facts set forth in the affidavit, which may be proposed by either the court or opposite party. In *People v. Plyler*,⁶² an application for a continuance, supported by a showing on affidavits and otherwise, had been made by the defendant at the calling of the case for trial, which clearly entitled him to a continuance, which application was denied. During the trial of the case the district attorney made the following statement to the court: "I have received information, which I believe to be authentic, that the witness (Mrs. Plyler) is no longer ill, if she ever was, and is up and about the streets of San Jose, and that if the defense desire her attendance they have time to procure her now." Counsel for defense answered that, though she had been subpoenaed by the defense, their information was that she was still too ill to be produced in court. The judge expressed his willingness to issue an attachment for the witness at demand of either side, and, neither party requested it, there the matter rested. The supreme court, referring to this offer of the district attorney and the court, and to their reception by defendant's counsel said: "This could not cure the error. If the district attorney was justified in his belief that the witness was malingering, or had recovered from her illness, he should have caused her to be produced in court, and thus have saved the case from the injury worked by the court's

⁶² 121 Cal. 160, 53 Pac. 553.

and to operate as a discontinuance of the proceeding.⁶⁵ In this case the court said: "The summary nature of the proceedings is inconsistent with the exercise of the general discretionary power of granting continuances possessed by courts in civil actions. The expression of the particular mode and time of continuance is exclusive of all nonenumerated modes and times. The continuance from the sixth of the month, when the cause was on trial, to the thirteenth of the same month, against the objections of the respondent and without an affidavit showing cause, was unauthorized, and operates as a discontinuance of the proceeding." In the trial of election contests, courts are, with respect to continuances, or postponements, governed to some extent by the provisions of section 1121 of the Code of Civil Procedure of California, reading as follows: "The court must meet at the time and place designated, to determine such contested election, and shall have all the powers necessary to the determination thereof. It may adjourn from day to day until such trial is ended, and may also continue the trial, before its commencement, for any time not exceeding twenty days, for good cause shown by either party upon affidavit, at the costs of the party applying for such continuance." In *Falltrick v. Sullivan*,⁶⁶ this section was construed as not limiting the power of adjournment by the court of a special session ordered for the trial of an election contest, merely from day to day, or upon good cause shown by either party, not exceeding twenty days. That is to say, the provision is not exclusive to the extent of depriving the court of power according to the usual practice of adjoining the session for several days of its own motion, on account of prior engagements of the court, rendering such adjournment necessary; nor does the court lose jurisdiction to try the contest, on account of such adjournment. In this case the postponement was of the court's own motion; but, the supreme court went into a general discussion of the powers of courts in election contests to grant continuances, and incidentally pointed out the effect upon the question of the change in the judicial system effected by the abolition of terms of court. But the comment of the court

⁶⁵ *Keller v. Chapman*, 34 Cal. 635, 640.

⁶⁶ 119 Cal. 613, 51 Pac. 947.

upon the prior case of *Lord v. Dunster*,⁶⁷ is a strong intimation, if, indeed, it is not a positive assertion, that the provisions of section 1121 are not exclusive, except to the extent that no continuance for a longer period than twenty days can be allowed, and that courts, in such cases, still possess the powers, conferred by sections 594 and 595 of the Code of Civil Procedure, in the matter of adjournments and continuances. The court said, speaking with reference to the prior case: "The purpose for which the continuance was asked, the showing made in support of it, the fact that the motion was made after the submission of the case, though before the decision was announced, and the spirit and scope of the decision, all tend strongly to support the conclusion in this case that the court did not lose jurisdiction. The facts in *Lord v. Dunster*, in our judgment, would have required the same judgment in this court if the time required to produce the witnesses had made a longer continuance necessary."

The former cases on the subject⁶⁸ may be considered as no longer authority, except so far as they are applicable to cases arising under the sections granting general authority to continue.⁶⁹

§ 146. Imposing conditions upon granting.

The trial court may make an order granting a continuance subject to reasonable conditions; for instance, that the testimony of the witnesses in attendance shall be taken at the time, by and before the court, in the form of depositions,⁷⁰ or upon condition that the fees of jurors in attendance,⁷¹ or the costs occasioned by the postponement,⁷² shall be paid. The

⁶⁷ 79 Cal. 477, 486, 21 Pac. 865. In this case, the refusal to grant a continuance for two days, required to produce evidence in an election contest, was held to have been an abuse of discretion.

⁶⁸ *Keller v. Chapman*, 34 Cal. 640; *Norwood v. Kenfield*, 34 Cal. 232.

⁶⁹ Cal. Code Civ. Proc., §§ 594, 595.

⁷⁰ *Thomas v. Black*, 84 Cal. 221, 23 Pac. 1037.

⁷¹ *Baumberger v. Arff*, 96 Cal. 261, 31 Pac. 53.

⁷² *Eltzroth v. Ryan*, 91 Cal. 584, 27 Pac. 933.

court may impose costs other than those properly taxable, as a condition for postponing the trial, and to proceed therewith upon the refusal of the party applying for the postponement to comply therewith.⁷³ Of course, the court can impose no such conditions in criminal cases, nor in a civil case, where the showing is such that the party is entitled to a continuance as of right, or such that it would be an abuse of discretion not to grant it unconditionally.

⁷³ *Pomeroy v. Bell*, 118 Cal. 635, 50 Pac. 683.

CHAPTER 9.

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VI. ESSENTIALS OF AFFIDAVITS.

- § 181. Specifications of misconduct—Sources of knowledge at the trial.

1. SCOPE AND GENERAL VIEW OF SUBJECT.

- § 147. What included and what excluded.

Misconduct of jurors is a subject which assumes and admits of a very wide range of definitions, determining in the first place what amounts to misconduct within the meaning of the particular subdivision of the law specifying it, and in the second place the instances of misconduct which will warrant or necessitate the granting of a new trial, we are met with many exceptions, qualifications of opinion, so that a nice discrimination

in systematically discussing, and fully comprehending the subject.

Subdivision 2 of the California statute, section 657 of the Code of Civil Procedure, reads thus: "Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors." All of the subdivision after the first four words constitutes a mere statutory rule of evidence, which is considered under the appropriate head.¹ It is obvious that a resort to a determination by lot or chance is but a species of misconduct, and that the purpose of the legislature in the addition of all after the first four words of this subdivision was merely to relieve the jurors of the common-law disqualification from testifying to that species of misconduct; so that, in substance, the ground for new trial therein provided is just as broad, and is no broader, than if, as in other states, it had merely specified "Misconduct of the Jury." Therefore, resort may be had, for purposes of elucidation and illustration, equally to the decisions of each and every state, and to adjudications under the English common law.

The misconduct of juries was among the earliest grounds of the jurisdiction, if indeed it was not the first recognized head of jurisdiction to interfere with verdicts for the purpose of granting new trials. There has been no substantial change by statutes on this ground for new trial, either in civil or in criminal cases.

The subdivision of what is now section 657 of the Code of Civil Procedure of California read, prior to the amendment of 1862, simply "Misconduct of the Jury."² In 1862, it was amended to read substantially as at present.³ Since, however, as previously explained, the language is as broad without as with the additional clause, all the decisions prior to the

¹ See post, §§ 406-410.

² Laws, 1851, p. 81, § 193.

³ Laws 1862, p. 38.

amendments, which have not been overruled or qualified, and which define or disclose what acts constitute misconduct, are as applicable as those rendered subsequently.

Before proceeding to state and illustrate what falls within the meaning of the term as here used, it is proper to mention a few matters not covered by it. It does not include the acts of jurors prior to their being accepted and sworn to try the issues, no matter how reprehensible such acts may be or how much they may affect the result of the trial. As heretofore explained, such acts, for instance, concealment of disqualifying facts upon voir dire examination, constitute irregularities. Misconduct does not include a disregard of instructions. That species of misconduct, if such it might be designated, can be reached only on the ground of insufficiency of evidence or on the ground that the decision is "against law." The misconduct here meant is such conduct as either actually or presumptively negatives the fairness of the trial; in other words, affects the verdict prejudicially to the losing party. In the history of jury trials a great variety of acts on the part of juries and jurors have been held to constitute misconduct. But, whether misconduct of any kind or degree will entitle a party to a new trial in a particular case may depend upon several considerations additional and collateral to the act or conduct in question. Among these are the inspiring motive, the time and place, relation of the act or conduct complained of to the adverse party, and any acts of acquiescence or omission of the complaining party with reference to his duty to call the matter to the attention of the court. Misconduct of one juror has the same effect to vitiate the verdict as misconduct of all, because the jury can only act as a unit, and the misconduct of one cannot be eliminated.⁴

§ 143. Presumption and showing of prejudice.

Whether misconduct of the jury will entitle a party to a new trial in any particular case depends primarily upon its character; and if it be such that it may have prevented a fair trial, its effect not being shown, or not being susceptible of being shown, a new trial should be granted, unless the success-

⁴ *State v. Morgan*, 23 Utah, 212, 64 Pac. 356.

other hand, proof of trifling misconduct of a juror, which could not be prejudicial to the moving party, is not ground for disturbing a verdict.⁷ Where, however, the misconduct of a juror

⁷ *Siemsen v. Oakland etc. Ry. Co.*, 134 Cal. 494, 66 Pac. 672.

Whether the verdict should be disturbed sometimes depends upon the particular stage of the case, and the point or special feature of the issue upon which the act of misconduct has a bearing and whether it could have affected the minds of the juror or jurors upon any question vital to the final results. What is here meant will be better understood by noting what was said by the court in this case as follows: "There is left, then, for consideration the affidavit of Putnam alone. Putnam swears that during the trial of the cause, while passing with his car at the scene of the accident, he saw Long 'standing between the tracks, watching the car and observing its progress'; also, that 'he seemed to be examining the ground and the south track. . . . He made examination of the rails of the company in the locality of the Lake View Cottage, and seemed to be trying to understand their construction and position.' This affidavit is not controverted. The foregoing is all of the evidence upon misconduct. While the exercise of a liberal discretion in the granting of new trials is recognized, it does not follow that an order must always be upheld, or will be upheld, where an examination of the record shows that the misconduct was of such trifling nature that it could not, in the nature of things, have been prejudicial to the moving party. Where it appears that the fairness of the trial has been in no way affected by such impropriety, the verdict will not be disturbed: *State v. Allen*, 89 Iowa, 49, 36 N. W. 261. Where the locus itself is in dispute, or where its exact condition has an essential bearing upon the controversy, it may well be that a verdict should be set aside upon proof that a juror improperly acquired knowledge of that locus, or its condition, by visiting the place, but, as was said in *Bowman v. Western Furniture Mfg. Co.*, 96 Iowa, 188, 64 N. W. 755, where there is no controversy as to the locality inspected, and no probability of prejudice resulting from the inspection, the verdict should not be disturbed. Here the place of the accident was not disputed. The cause of the accident, as alleged in the complaint, and upon proof of which alone plaintiff was entitled to recover, was, that the car was so 'negligently and carelessly maintained, operated and managed, that, while moving at great and unlawful speed, it ran off the track of said railroad.' That it did run off the track is not disputed, the defense against this charge of negligence being that the accident occurred by reason of a latent defect in a wheel, which could not, by the exercise of due care, have been discovered, and which was not discovered. It is not charged in the complaint that the car left the track by reason of

complained of is such as would be naturally prejudicial to the party complaining, he is not required, in order to entitle him to a new trial, to show affirmatively that he was prejudiced.⁸ In *Commonwealth v. Roby*,⁹ Chief Justice Shaw, delivering the opinion said: "The result of the authorities is that where there is an irregularity which may affect the impartiality of the proceedings, as where meat and drink or other refreshment has been furnished by a party, or where the jury have been exposed to the effect of such influence, as where they have improperly separated themselves, or have had communications not authorized, there, inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate method of correction or relief is by undoing what is thus improperly, and may have been corruptly, done; or where the irregularity consists in doing that which may disqualify the jurors for proper deliberation and exercise of their reason and judgment, as where ardent spirits are introduced, then it would be proper to set aside the verdict, because no reliance can be placed on its purity and correctness. But where the irregularity consists in doing that which does not and cannot affect the impartiality of the jury, or disqualify them from exercising the powers of reason and judgment, as where the act done is contrary to the ordinary forms, and to the duties which jurors owe to the public, the mode of correcting the irregularity is by animadversion upon the conduct of the jurors or of the officers; but such irregularity has no tendency to impair the respect due to such verdict." It will be observed that the learned chief justice terms "irregularity" what is

defective rails or roadbed, and we fail to see, therefore, how the affidavit of Putnam, which amounted to nothing more than that he saw the juror between the tracks, seemingly examining them, is a sufficient showing to justify a new trial."

⁸ *Alm v. Andrews Bros. Co.*, 8 Ohio C. C. 391; *Edney v. Baum*, 44 Neb. 294, 62 N. W. 461; *Young v. Otto*, 57 Minn. 307, 52 N. W. 199; *Bryson v. Railway Co.*, 89 Iowa, 677, 57 N. W. 430.

⁹ 12 Pick. (Mass.) 519. And in *Howington v. Worcester etc. Ry. Co.*, 157 Mass. 579, 82 N. E. 955, the same court said: "The question of fact in case of misconduct of jurors is not whether their minds were influenced, but whether the act might have influenced them."

now universally treated as misconduct. This failure to distinguish between them is a feature of many opinions of the present day. There was, however, in his time, which was prior to the era of statutory distinction, and specification, little difference between them recognized. As will be seen in subsequent parts of this chapter, there are very strong assertions in some of the opinions to the effect that certain kinds of misconduct, for instance, violations of positive statutory requirements, necessitate a new trial, without regard to the motive of the act or circumstances attending it, and despite any showing made by the opposite party. But it is also shown, in the same connection, that the same general rule, above stated, applies to all species of misconduct, and that such rule is in consonance with the spirit of such statutes.

§ 149. Duty of party to call misconduct to court's attention.

The general rule, often stated, that a remedy for any act or episode endangering the fairness of a trial must be sought and applied at the earliest practical moment by the party complaining, or having a right to complain, is applicable to all kinds and grades of misconduct of the jury. Stated more specifically, the rule is, that though the jurors, during the progress of the trial, are guilty of such misconduct as would have required the court, on motion, to admonish them, or otherwise apply a remedy to remove the effect, or if no such remedy be adequate, to discharge them, yet if he, with knowledge, fail to make any objection or call the court's attention to the alleged misconduct, and allows the trial to proceed to a verdict, he cannot subsequently take advantage of such misconduct on motion for a new trial.¹⁰ And a party may himself rebut the

¹⁰ See *Aurora etc. Tp. Co. v. Niebrugge*, 25 Ind. App. 567, 58 N. E. 864 (case of unauthorized view of premises); *Bruswitz v. Netherlands Am. Steam Nav. Co.*, 64 Hun, 262, 19 N. Y. Supp. 75; *Easley v. Missouri Pac. Ry. Co.*, 113 Mo. 236, 20 S. W. 1073; *State v. Fenlason*, 78 Me. 495, 7 Atl. 385; *State v. Salverson* (Minn.), 91 N. W. 1 (intoxication of juror); *People v. Deegan*, 88 Cal. 602, 26 Pac. 500 (case of intoxication of juror); *Osmun v. Winters*, 30 Or. 177, 46 Pac. 780; *Consolidated Ice Machine Co. v. Trenton Hygiene Ice Co.* (C. C.), 57 Fed. 898; *Jackson v. United States*, 102 Fed. 473; 42 C. C. A. 452 (case of receiving evidence during deliberations).

passed between a juror and an outside party, he ascertains that a conversation was carried on between them and drops the subject without asking what was said.¹¹ There are, however, exceptions to this as there are to most general rules; and circumstances may excuse any action by the party prior to verdict, even where he has, or is chargeable with, knowledge of the misconduct. Thus, where the misconduct occurred during the night, and immediately upon the opening of court next morning, and before the party had opportunity to object, or to call the attention of the court to the misconduct, the court asked the jury if they had agreed upon a verdict, and thereupon their verdict was delivered.¹²

II. SEPARATION OF JURY.

§ 150. General view.

No specific mandatory provisions are found either in the Penal Code or in the Code of Civil Procedure of California, as to the keeping together or separation of jurors during the trial and prior to final submission to them of the issues; and even in criminal cases, the jury may be permitted to separate, before final submission, from day to day, after being admonished as provided in section 1122 of the Penal Code.¹³ It is the usual practice, however, to keep them together in capital cases. The Penal Code of California¹⁴ has the following provision: "When a verdict has been rendered against the defendant, the court may, upon his application, grant a new trial, in the following cases only: . . . 3. When the jury has separated without leave of court, after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented." Thus, it has stood from its first enactment as part of the Criminal Practice Act of 1851.

of those who witness it or are informed of the manner in which it is conducted" (page 608).

¹¹ *King v. State*, 91 Tenn. 617, 20 S. W. 169.

¹² *Hanrahan v. Ayers*, 31 N. Y. Supp. 458, 10 Misc. Rep. 435.

¹³ *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049; *State v. Shaffer*, 23 Or. 555, 32 Pac. 545; *United States v. Swan*, 7 N. Mex. 306, 24 Pac. 533.

¹⁴ § 1181

was doubtless the result of necessity. Many expressions are likewise found which go to the opposite extreme. Thus, in *McKinney v. People*¹⁸ the court said: "In this case, if the jury did separate without the consent of the prisoner, it was an irregularity, and the court below would, upon the fact being established, have been bound to set aside the verdict and grant a new trial, unless such separation was the result of misapprehension, accident, or mistake on the part of the jury, and under circumstances to show that such separation could by no possibility have resulted to the prejudice of the prisoner." How could the cause of separation affect the rights of the prisoner? It would, in most cases, be very difficult for the opposite party to make a showing which would exclude the possibility of prejudice.

From many excesses and shortcomings of judicial expression on this subject, in unsuccessful attempts to state a rule equally applicable to all cases, a task which no one fully conversant with the subject will assume, no little confusion and uncertainty has resulted. In an early New York case of unauthorized separation, the difficulty of laying down a fixed unbending rule was appreciated, the court saying: "Whether the verdict is to be set aside must depend upon circumstances, and the real justice of the case."¹⁹

Some confusion resulted in the early stages of our judicial history from the fact that some of the American courts did not take notice of the relaxation in England of the strict common-law rules as to the control of juries, and were in doubt as to whether the court had any discretionary power to refuse a new trial in case of a separation under any circumstances. In *Burrill v. Phillips*,²⁰ Story, J., said: "And, without doubt, as this is an application to the discretion of the court, the verdict ought to be set aside, unless the conduct of the juror be free from unfavorable presumption. I am perfectly satisfied with the verdict in this case; indeed, I do not see how

¹⁸ 2 Gilma. (Ill.) 540, 43 Am. Dec. 65, and note.

¹⁹ *Smith v. Thompson*, 1 Cow. 221.

²⁰ 1 Gall. (R. L., U. S. Dist.) 360, Fed. Cas. No. 2200. See, also, *Com. v. McCaul*, Va. Cas. 271.

perience and observation teach that such acts are seldom attended with evil motives, and are usually the result of impulse and thoughtlessness, and the circumstances attending the separation which are not and cannot be concealed give either palpably innocent or palpably sinister color to it in almost every instance. There are, for instance, many cases of separation having a general similarity to the following: Prior to retiring for consideration of their verdict, the court permitted the jury to go in charge of an officer to a hotel for supper. They went to the washroom, and two of their number returned to the hotel office before the others, and engaged in conversation with several persons for a few minutes. Nothing was said in reference to the case, and the separation of the two from their fellows was only for a few feet, and the entire jury was at all times in charge of the bailiff. It was held that such a separa-

305; cases of suspicious conduct of jury: *Cornelius v. Starr*, 7 Eng. (Ark.) 810, exposure of jurors to improper influences during separation; *Stanton v. State*, 13 Ark. 320; *Coker v. State*, 20 Ark. 53; *Wood v. Starr*, 34 Ark. 341, 36 Am. Rep. 13; *State v. Sherbourne*, Dud. (Ga.) 28, where jurors permitted by bailiff to disperse and mingle with others; *Berry v. State*, 10 Ga. 511, improper communications during a separation consented to; *Phillips v. Commonwealth*, 19 Gratt. (Va.) 488, where strict Virginia rule was given effect; *Warren v. State*, 9 Tex. App. 619, 35 Am. Rep. 745, separation continuing several hours; *Daniel v. State*, 56 Ga. 653; *Commonwealth v. Shields*, 2 Bush (Ky.), 81; *State v. Harris*, 12 Nev. 414; *Madden v. State*, 1 Kan. 340, cases of separation after submission; *Weiss v. State*, 22 Ohio St. 486, where a juror left his fellows and took a drink of liquor, no explanation being given; *State v. Parrano*, 16 Minn. 178, separation violative of statute; *Williams v. State*, 45 Ala. 57, after evidence all in; *Jumpertz v. People*, 21 Ill. 375, holding that in case of separation, prosecution must show impossibility of prejudice, in order to avoid a new trial; *Early v. State*, 1 Tex. App. 248, 28 Am. Rep. 409, where jury dispersed for several hours during a fire; *People v. Douglas*, 4 Cow. 26, 15 Am. Dec. 332, and *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760, cases of separation and intoxication; *Nickelson v. Smith*, 15 Or. 200, 14 Pac. 40, where jury, after delivering to justice an informal verdict, separated and the next day appeared and corrected the same; *Voss v. Muller*, 23 Neb. 171, 36 N. W. 583, where officer took two jurors to a saloon and treated them during an adjournment.

tion of the jury is not cause for a new trial. In addition to the separation in contravention of the law, it must be further made to appear that by reason of such separation probable injustice to the accused has been occasioned."²⁸ But the general weight of authority appears to support the rule that unless the absence of injury appear by the act of separation and the attendant circumstances, the party opposing the motion has the burden of showing that the separation was without prejudice. Such rule imposes but little inconvenience, since the jurors themselves, as well as persons in charge of them, are competent witnesses for the purposes of exculpation or explanation. It would appear from some of the adjudications that there must be at least a suspicion naturally arising from the conduct of the juror or jurors. Thus in *State v. Turner*²⁹ the court said: "We will not say that because a juror was for a moment out of the presence of the officer under whose charge he was, when it was not shown or alleged that he had any communication with any other person, and it does not appear that he had any opportunity to have had any, it necessarily establishes the presumption of misconduct, and makes it obligatory upon us to set aside the verdict." In a later case the same court stated the rule as it is now generally understood—namely, that to justify the quashing of a verdict, on the ground that the jury were allowed to separate during their deliberations, it must be shown that there was such a separation as might have operated injuriously to the accused.³⁰

§ 152. Legal phases of the subject of separation of jury in California.

Questions relative to the duty of the court in cases of unauthorized separation have been often presented in the supreme

²⁸ *Ogle v. State*, 16 Tex. App. 368. Such appears to be the established law in Texas.

²⁹ 25 La. Ann. 574. To same effect *State v. Veillon*, 105 La. 411, 29 South. 883. But when, in a capital case, the separation was complete, so that some of the jurors were out of sight of the others, the same court held a new trial must be granted: *State v. Moss*, 47 La. Ann. 1514, 18 South. 507.

³⁰ *State v. Garig*, 43 La. Ann. 365, 8 South. 934.

phraseology and applying to the cases before them, the identical doctrine of that case. At any rate, and with whatsoever plausibility it may be claimed that there is a conflict between the first and some of the subsequent cases, a review of all the cases cannot but lead the reasoning and discriminating mind to the conclusion that the doctrine of that case is the settled law on the subject in California, both in criminal and in civil cases. In *People v. Bonney*³⁴ it was remarked parenthetically that that case "goes to the very verge of the true rule, if not beyond," but the case referred to was entirely inapplicable to the case then before the court, as the learned justice delivering this dictum immediately admitted. The fact of the separation and the circumstances attending it showed on their face that the separation in the case then before the court was innocent and harmless. In *People v. Brannagin*,³⁵ it is declared that where a jury, in a criminal action, after having retired to deliberate upon their verdict, separate, without the permission of the court, the "irregularity" is sufficient ground for setting aside a verdict of guilty by them, unless it be shown affirmatively by the prosecution that the defendant was not prejudiced thereby. The court does not mention the earlier case, but declares identically the same principle then announced. The court did not see fit to make any distinction between the legal effect of a separation after the submission of the case, covered by section 402 of the Criminal Practice Act then in force (corresponding with section 1128 of the Penal Code), and a separation prior thereto. A separation after final submission, by leave of court, and consent of counsel, is, according to a later decision, an irregularity, fatal to the verdict, aside from any actual or potential consequences of the separation; and it would seem that no affirmative showing by the prosecution could cure the irregularity.³⁶ In *People v. Symonds*,³⁷ the court prefaced its discussion of the point by stating the true principle thus: "The mere fact that a jury

³⁴ 19 Cal. 445.

³⁵ 21 Cal. 338.

³⁶ *People v. Hawley*, 111 Cal. 78, 43 Pac. 404.

³⁷ 22 Cal. 352.

parate is not a reason for granting a new trial. The jurors have been so situated that they may have been misled with this reason why such separation, unexplained, is held a sufficient ground for setting aside their verdict. The separation in *People v. Wheatley*²⁹ was a neces-

sary and the subsequent cases of *People v. Kelly*, 46 Cal. 355; *People v. Yut Lung*, 74 Cal. 569, 16 Pac. 489, and *People v. Moore*, 238, were instances of trivial and harmless separation. See, *Territory v. Hart*, 7 Mont. 489, 17 Pac. 718; *Territory v. Claymont*, 1, 19 Pac. 293; *State v. Harris*, 12 Nev. 414, 422; *Carr v. Ward*, 8 Nev. 33; *State v. Jones*, 7 Nev. 408; *State v. Ward*, 300, 10 Pac. 133; *Kirby v. Tel. Co.*, 4 S. Dak. 105, 46 Am. 765, 55 N. W. 759; *Keller v. Bley*, 15 Or. 429, 15 Pac. 705. *State v. Ward* is a case where the court disregarded technical proprieties harmless on their face. The language of the court in discussing the facts and circumstances requires but slight modification to render it applicable. Chief Justice Lewis, delivering the opinion, said: "One of the attorneys for the respondents, seeing the juror leave the courthouse, supposed that a verdict had been agreed upon and inquired of the juror if such were the case, and was answered in the negative. The respondents show that not another word passed between the parties at this time, and that this conversation took place in the presence of two disinterested witnesses, and was wholly inadvertent. The second point relied on is that this conversation; it was evidently not. This could not be said to be a violation of the rules concerning the case, and it was beyond the range of the rules that it could have prejudiced the appellants, and therefore we do not authorize a setting aside of the verdict. It appears from the evidence that the juror was returning to the juryroom, again seeing the attorney whom he had seen upon going out, he requested him to send for a bottle of liniment, which was prepared for him at a certain drug store in the town, and which he wished to use, as he was quite lame and suffering much pain. The attorney replied that he would do so, and nothing further passed between them. The liniment was sent for and passed to the juror by the officer in attendance. This, it is argued, is such an extension of favor to the juror and attorney of the prevailing party, as to vitiate the verdict. The rule announced in the case of *The Sacramento etc. Miners v. Powers*, 6 Nev. 291. It was held in that case that the treatment of the jury by the prevailing party with spirituous liquor would vitiate the verdict. The act in that case was volunteered, and was uncalled for by any rule of civility or propriety. The law, as it is laid down, is sustained by a very strong current of decisions, and is recommended by the strongest considerations of policy and justice. But there is nothing in that case which even intimates that the parties to a suit must disregard the simple dictates of hu-

sary and momentary separation of one juror from the others after retirement, and of such a character as to exclude the possibility of injury to the defendant. Instances of that character constitute an exception to, or rather are not within the spirit of, section 1128 of the Penal Code. Had it been of a different character it would come under the head of misconduct, rather than irregularity, having occurred without leave of court, which was given in the case of *People v. Hawley*, constituting it not only misconduct of the jury, but also an irregularity of the court, of such serious import that it could not be cured even by consent of the prisoner.

In view of what precedes with reference to presumption and the shifting of the burden of proof, it is obvious that the case

manity, or refuse to discharge the commonest duties imposed upon them by the laws of God and morality alike. To refuse to perform so slight an act to relieve the sufferings of a juror would be a clear disregard of the plainest duty, which no circumstances can justify, and which the law does not demand. There is a marked distinction between the performance of a mere act of humanity or duty for a juror, as in this case, and the voluntary offer of civilities, which neither duty, charity, nor the conventionalities of society require of a man. And this is the distinction between the case of the *Sacramento Company v. Showers* and the case at bar. The compliance with the request of the juror was not such act as should vitiate the verdict." To same effect is *State v. Harris*, *supra*. The facts in *Keller v. Bley*, *supra*, were not innocent on their face, but rather suspicious. It was a case of uncalled for intercourse between counsel of one of the parties and the jurors. The court said: "The court's finding that no conversation with the jurors was had, and no communications made by the two counsel, was hardly a sufficient reason for denying the motion; it did not find that said counsel had any excuse for being where they were, nor that they did not employ arts and insinuations calculated to induce a belief in the minds of the jury that the respondent had done the work well, which it might reasonably be inferred was their purpose in being on the ground. Besides their presence upon that occasion gave rise to a suspicion that justice was not being fairly administered, and tended to incite a general belief that the law is lax and ineffectual in the adjustment of controversies between parties, a sentiment that is in contravention of the public good. And again, it is not always a decisive question, in such cases, whether the conduct that is objected to did injure or not." But the court yielded to the superior knowledge of the trial judge.

29 88 Cal. 115, 26 Pac. 95.

of *People v. Bemmerly*⁴⁰ calls for special notice and comment. The opinion was by Justice Harrison, who seems to have completely overlooked the principles governing the subject, ancient and modern, and the authorities bearing on it, English, American, federal and state. The opinion is lengthy, but the following extracts show how far the foregoing criticism is correct: "The direction of the court did not give to the defendant the right to control the action of the jury or of the officer in that respect during the pendency of the trial, nor the right to any exception for error or misconduct by reason of a failure to literally comply therewith. The mere fact that the direction of the court was violated does not give to the defendant the right to have the verdict set aside. He must show as fully as if the direction had been given that one or more of the jurors was influenced in his verdict by such separation. Neither does the mere fact that a juror drank intoxicating liquor during the trial show that his verdict was affected thereby. . . . The failure on the part of the people to call two of the jurors to exonerate themselves from the charge of having been influenced in their verdict, by reason of the violation of the above direction of the court, does not strengthen the position of the defendant. The burden of showing error was upon him, and in the absence of any showing that these two jurors had themselves drank any liquor, or conversed or been spoken to about the case, the people were not required to introduce negative testimony upon these points." The facts, as stated by Justice Harrison, are a sufficient criticism of his enunciation of the law. They were as follows: "It appears that after an adjournment upon one of the days while the cause was on trial, certain of the jurors, while upon the street in company with the sheriff, joined a crowd of people who were listening to the utterance of a street fakir, and were for a few minutes out of the sight or custody of the sheriff; that on a Sunday which intervened during the trial, eight of the jurors, in company with a deputy sheriff, attended church separately from the remaining four, and that some of the other four listened to the singing and preaching of the Salvation Army in the

⁴⁰ 98 Cal. 299, 33 Pac. 263.

streets of Woodland ; that one of the jurors, in the company of a deputy sheriff, visited his place of business without being accompanied by the others; that individual jurors were several times during the trial separated from the body of jurors for a few minutes at a time, and occasionally were out of sight of the officer who had them in charge; that several of the jurors at various times during the trial drank intoxicating liquors, and at times engaged in conversation with other persons. It was not shown that anything was said to either of the jurors concerning the case before them, or that they were at any time during their separation guilty of any misconduct, or that they did any act inconsistent with their duties as jurors. The amount or character of the intoxicating liquors which they drank is not shown, nor the times or frequency of such drinking, and it was not claimed that either of them was in any visible way affected thereby." It is true that ten of the twelve offending jurors sought to exculpate their misconduct by their own testimony, the other two remaining silent. Not a word was said, however, by the learned justice as to the little value to be attached to such testimony. Conceding, however, that the decision may be upheld by reason of the self-exoneration of the jurors, it is thought that such misleading expressions, relating to substantive law, on so important a subject, ought not to pass without comment. It will be observed that no authority was cited. The case was not cited as authority in *Salzman v. Telephone Co.*,⁴¹ nor referred to as authoritative in any other California case on that point. The facts appearing in *Territory v. Hexter*⁴² would appear upon first impression to bring the case within the rule which was given effect in *People v. Hawley*. The jury had separated from 5 o'clock P. M. until 9 A. M. of the succeeding day after returning to consider the verdict, and before returning a verdict, but not before they had agreed upon a verdict and delivered it sealed to the clerk of the court. The court considered that their previous agreement completely negated any prejudice to the defendant. Whatever may be thought of this conclusion it is

⁴¹ 125 Cal. 501, 58 Pac. 169.

⁴² 3 Mont. 206. See, also, *State v. Anderson*, 41 Minn. 105, 42 N. W. 786.

precautions taken to prevent it, which will justify the granting of a new trial, the law is the same, without reference to the character of the litigation.

A distinction has sometimes been attempted, without a difference, with reference to the stage of the trial at which a separation occurs. It must be conceded that there appear some good reasons for the application of a stricter rule to a jury after final submission to it of all the evidence, all the arguments, and the instructions of the court. The difference is more one of circumstance than of law. But with strange inconsistency it is held that where the separation is by leave of court and consent of parties at that stage, it is necessarily fatal to the verdict, but that if the separation occurs by the volition of the jurors, without leave or consent, its effect upon the verdict depends upon the circumstances. In *People v. Hawley*,⁴⁵ a case of felony, the court appears in part to base its conclusion upon the mandatory provision of the Penal Code,⁴⁶ and in part upon the circumstances attending the separation. And while placing stress upon the fact that the separation occurred after final submission, cases are cited, in some of which the illegality of the separations consisted in the fact that they were in violation of the instruction and admonition of the court, in all of which there was the element of opportunity for intercourse with outsiders, and consequent exposure to contaminating influences. And the prevention of these being the only purpose of any and all statutes on the subject, the only distinction in reason between a separation before and a separation after final submission consists in the increased temptation on the outside, and the increased susceptibility on the inside of the juryroom. The party's rights, with reference to the protection of the jury from outside interference and intrusion, are just as sacred at one stage as at another, and they are violated in the same legal sense by a separation in violation of the court's order authorized by law, as where the separation violates a statute which is directly applicable. And the authorities cited by the court in the case last mentioned treat the consent of the prisoner as of little importance, whether the separation be in

⁴⁵ 111 Cal. 78, 43 Pac. 401.

⁴⁶ §§ 1128, 1136.

violation of a court order before retirement to consider the verdict, or without leave of court, but contrary to law, after retirement. In *People v. Hawley*, the facts and circumstances are stated fully and in great detail in the opinion and, upon the points urged against the verdict, few stronger cases for new trial can be found, without regard to any stage of the trial at which the separation occurred.

The following conclusions may be drawn as a result of an examination of the authorities: 1. If, after final submission, the jury, of its own accord, or with the consent of the officer in charge, separate and disperse as a body, or if one or more of the jurors voluntarily absent themselves from the others, and the circumstances as shown to the court do not exclude the probability of contamination, a new trial will be granted; 2. If, after final submission, a separation and dispersion of the jury occur by leave of court, whether with or without the consent of the parties, in a criminal case, a new trial must be granted for the irregularity of the court without regard to the question of misconduct of the jury. Whether the irregularity may be waived by consent to a separation in civil cases, under statutes like that in California, appears not to have been directly decided; but all the cases in which new trials were granted for this cause were criminal, and the courts were careful to limit their language to that class of cases. It is evident, however, that even in a civil action it would be a fatal irregularity for a separation and dispersion to occur under the direction of the court without consent of the losing party.

Cases of accident and necessity constitute exceptions to all laws and rules, such for instance as the temporary sickness of a juror, and it has often been held that jurors taken ill might be withdrawn, accompanied by an officer, for the purpose of procuring relief. And in such case it is thought that the sanction of the court would not render that illegal which otherwise would have been legal, even after final submission in a criminal case.

§ 154. Views in particular states.

Under the Nevada statute,⁴⁷ it was held that the defendant

⁴⁷ 1 Comp. Laws, per. 2004.

might waive the provision requiring that the jury, when sworn to try an indictment for felony, "shall be kept together until they are finally discharged by the court," and that a separation after such consent would not per se render a conviction invalid.⁴⁸ In so far as the court held that such separation does not per se vitiate the verdict the decision is supported by the weight of authority; but that the defendant's consent is of any importance in case of separation and dispersion, or any separation not trivial and harmless on the face of the matter, it is opposed by the weight of authority.⁴⁹

The Colorado statute⁵⁰ provides that "after hearing the charge, a jury may either decide in court or retire for deliberation." It was held that the mere separation of a jury in a civil case, after the evidence, charges and arguments are concluded, will not per se be sufficient ground for setting aside the

⁴⁸ *State v. McMahon*, 17 Nev. 365, 30 Pac. 1000. This was a separation before final submission. The court said (in part): "It should be remarked that generally, where it has been held that a separation of the jury, before final submission, is fatal, even though there is consent of both parties and the court, the trials were for capital offenses, and as is said in *Cannon v. State*, 3 Tex. 34, 'the principle is familiar that in cases affecting life, far greater strictness is required than in trials of an inferior degree.' The statute in relation to the separation of juries above quoted prescribes the method of procedure, without reference to consent or waiver, just as it does in relation to arraignment challenges to grand and trial jurors, and many other things that need not be mentioned. But it does not prevent a waiver of its privileges. If the jury had separated without the defendant's consent, either with or without the order of the court, the burden of proof would have been upon the state to show that the separation did prejudice this case, but with the consent and order the burden of showing abuse remains upon the defendant. He did not, however, consent to more than separation, and if there is legal proof that any of the jurors were tampered with or misbehaved themselves, or that anything else occurred which is ground for new trial, such facts must be held to have their full weight and influence": *Beebe v. People*, 5 Hill, 34.

⁴⁹ See *People v. Hawley*, 111 Cal. 73, 43 Pac. 404, and cases there cited; also, *State v. Parker*, 25 Wash. 405, 65 Pac. 776; *State v. Mason*, 19 Wash. 94, 52 Pac. 525; *Anderson v. State*, 2 Wash. 183, 26 Pac. 267; *State v. Place*, 5 Wash. 773, 32 Pac. 736; *McCampbell v. State*, 37 Tex. Cr. Rep. 607, 40 S. W. 496.

⁵⁰ Gen. Stats. 1883, § 172.

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few decisions under the Missouri statute established a strict undeviating rule to the effect that separation of the jury after final submission of the case to them necessitated setting aside the verdict, and ordering a new trial, regardless of any circumstances attending it.⁵⁷ But subsequent decisions have tended to a relaxation of the rule, trivial, harmless, and temporary separations no longer being considered a sufficient reason for ordering new trials on appeal.⁵⁸ In Texas, under a strict statute forbidding separation in a felony case, but allowing it by consent and leave of court, providing, however, that the separating jurors should remain in the custody of a sworn officer, it was held that a defendant could not by consent dispense with the presence of a sworn officer in case of such separation.⁵⁹ But the statute is not given a technical, unreasonable construction, and it is recognized that there may be unimportant separations not coming within the meaning and in-

⁵⁷ *State v. Gray*, 100 Mo. 523, 13 S. W. 806; *Ex parte Dusenberry*, 97 Mo. 504, 11 S. W. 217; *State v. Howland*, 119 Mo. 419, 24 S. W. 1016. In this case the rule under the Missouri statutes was thus clearly stated, according to the established view of the court at that date: "If the jury separates before the case has been finally submitted to them, the state may show that they were not subjected to improper influences during such separation; but a separation, without leave of court, after they have retired for deliberation, requires the granting of a new trial, as expressly required by Revised Statutes of 1889, section 4269"; See, also, *State v. Avery*, 113 Mo. 475, 21 S. W. 193; *State v. Sansome*, 116 Mo. 1, 22 S. W. 617.

⁵⁸ *State v. Schmidt*, 137 Mo. 266, 38 S. W. 938. See, also, *State v. Dyer*, 139 Mo. 199, 40 S. W. 768; *State v. Murray*, 126 Mo. 611, 29 S. W. 700. Circumstances rebut any presumption of prejudicial influence during separation in *State v. Gregory*, 158 Mo. 139, 59 S. W. 89. Also in *Spalding v. State*, 61 Neb. 289, 85 N. W. 80. In case of separation before retirement, it must be affirmatively shown by the prosecution that jurors were not subjected to improper influences: *State v. Orrick*, 106 Mo. 111, 17 S. W. 176, 329. In this case such affirmative showing was made. They may separate by leave of court before final retirement: *State v. Todd*, 146 Mo. 295, 47 S. W. 923. See, also, *State v. Frier*, 118 Mo. 648, 24 S. W. 220. When, during adjournment, a juror separated himself from the others, and mingled with a crowd, where the case was being excitedly discussed, some favoring and some condemning the accused, a new trial was ordered: *State v. Whitten*, 100 Mo. 525, 13 S. W. 871.

⁵⁹ *McCampbell v. State*, 37 Tex. Cr. Rep. 607, 40 S. W. 496.

§ 155. In federal court.

Where the separation of the jury is presented as a ground for new trial by the defendant, in a federal court, he must show prejudice by something more than the bare fact of separation, unless the circumstances of the separation are of themselves sufficient to indicate prejudice.⁶⁶ But this rule in the federal courts cannot be said to conflict with the strict rule of state courts under statutory inhibitions touching separations, since there is no such federal statutes.⁶⁷

§ 156. Cases illustrative of harmless and necessary separation.

While, as has been stated in several connections, prejudice will be presumed from an unauthorized separation of the jury, it has also been stated that error will not be presumed if upon the face of the showing of the separation, and its inseparably attendant circumstances, the improbability of prejudice also appears. It only remains to give a few illustrations of harmless and trivial separations. It was held that a conviction for murder would not be set aside because, after the jury retired, two of the jurors went to another room in the same building, and remained for thirty minutes away from the other jurors, nothing further appearing.⁶⁸ And a separation was held harmless where the jury separated for five minutes after final submission, and one of them, on account of lameness, remained locked in the juryroom while the others went in charge of the officer to their meals.⁶⁹ So, where a juror, in viola-

cured by the jury afterward appearing and presenting their verdict in open court: *Farley v. People*, 138 Ill. 97, 27 N. E. 927. Contra, *State v. Hodges*, 45 Kan. 889, 26 Pac. 676.

⁶⁶ *United States v. Davis* (C. C.), 103 Fed. 457, citing authorities, and holding that the omission to have the bailiffs placed in charge of the jury, specially sworn, on the trial of a felony, was not a ground for new trial in the federal courts, although it was so under the practice of the courts of the state where the trial was had.

⁶⁷ *Tullis v. Lake Erie etc. R. Co.*, 105 Fed. 554, 44 C. C. A. 597.

⁶⁸ *Blyew v. Commonwealth*, 12 Ky. 742, 15 S. W. 356.

⁶⁹ *Territory v. King*, 6 Dak. 131, 50 N. W. 623. See, also, *Edward Thompson Co. v. Gunderson*, 9 S. Dak. 42, 71 N. W. 764. Where the jury in a criminal case, after retiring, were taken into the courthouse yard, by reason of a fire in the courthouse, and there mingled

times appears to the layman, called to serve on a jury, preposterous that he is not permitted to obtain the truth from any and every available source. He seldom accredits the superior wisdom of counsel in these matters, or understands the true policy of the law.

§ 158. Inspecting premises.

It often occurs that the court is held near the scene of a transaction which is the subject of litigation. Under statutes in some states and in others without any statutory provision on the subject, juries are often permitted to visit and inspect the locus in quo. But they or some of them sometimes institute an examination and inspection without being authorized so to do; and in such cases new trials are usually granted, unless the absence of prejudicial effect be shown, which is usually difficult. Accordingly, it was held that the defendant in a criminal prosecution was not required to prove that he was prejudiced by misconduct of a juror in visiting the scene of the transaction out of which the charge originated without permission. It was enough that he might have been prejudiced, and that the state must show that he was not so prejudiced.⁷¹ And where the defendant's attorney in a civil action asked that the jury be permitted to view premises but plaintiff's attorney objected, and the court denied the request, and jurors viewed the premises of their own accord without knowledge of court or parties, it was held to entitle the defendant, the losing party, to a new trial.⁷² So where the location of objects and nature of the soil of the premises were material, and a juror, without consent of parties or of the court, visited the premises, it was held error, warranting a new trial.⁷³ And it was held to be a case for granting a new trial to the plaintiff when, in an action for damages for injuries caused by a vicious dog, the jurors went on the premises with one of the defend-

⁷¹ *State v. Vansciver*, 7 N. J. 268. See, also, *State v. Lucas*, 147 Mo. 670, 47 S. W. 1067; *State v. Soper*, 148 Mo. 217, 49 S. W. 1007; *State v. Favre*, 51 La. Ann. 434, 25 South. 93; *State v. Webb*, 20 Wash. 500, 55 Pac. 935.

⁷² *Garside v. Ladd Watch Case Co.*, 17 R. I. 691, 24 Atl. 470.

⁷³ *State v. Vansciver*, 7 N. J. L. 268.

which had been fully proven and demonstrated in court.⁷⁹ And for the same reason it was held not to constitute receiving evidence out of court where during recess some of the jurors re-examined the hide of a cow, which had been previously used as evidence in the case and examined by court and counsel in their presence and by them.⁸⁰

⁷⁹ *Titus v. State*, 49 N. J. L. 36, 7 Atl. 621. See, also, *Spencer v. State*, 34 Tex. Civ. App. 238, 30 S. W. 46, 32 S. W. 690.

⁸⁰ *Lennon v. Territory*, 5 Okla. 685, 50 Pac. 172. See, also, *People v. Tipton*, 73 Cal. 405, 14 Pac. 894; also a case of examining cow horns in evidence, not amounting to misconduct. In *People v. Tipton*, the facts and the court's views were thus stated in the opinion: "It appears from the record that at the trial the prosecution offered in evidence the horns of an animal claimed by the witness to be the horns of the stolen cow, and that, during the recess of the court, and that in the absence of the judge and part of the jurors, J. V. Gilbert, one of the jurors, picked up and examined said horns, held them in his hands for some time, turned them over, and looked at them. his conduct is assigned as a cause for which a new trial should have been granted, under subdivision 2 of section 1181 of the Penal Code, which provides that the court may grant a new trial 'when the jury has received any evidence out of court, other than that resulting from a view of the premises.' The prosecuting witness had identified the horns as those of his cow, and they were in evidence as such, but there was nothing peculiar about them, so far as appears, and their identification depended entirely upon the general statement by the witness that they were the horns of the cow he had lost. Under such circumstances, it is hard to discover how an examination of them by the juror amounted to evidence in the case. Evidence is that which tends to prove or disprove any matter in question, or influence the belief respecting it. Viewed by themselves, the horns proved nothing except their existence as such, and that was not a material fact in the case. The evidence depended upon the credit to be attached to the statement of the witness, that they were the horns of his cow, and that statement was not strengthened by an examination of the horns by the juror. Had the witness described the horns, and certain peculiarities possessed by them, and then presented them in support of his claim that they were the horns of his animal, it might at least be plausibly urged that comparing them with the testimony afforded evidence, but nothing of the kind was attempted so far as appears from the record. We are of opinion the examination made by the juror did not amount to receiving 'evidence out of court' within the meaning of the statute." From this it is apparent that a distinction should be made between a casual examination of an article introduced

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them, apparently to test the truth of defendant's statement, was reversible error.⁸²

§ 161. Independent legal researches by jurors.

Whether a new trial should be granted in any case because of legal researches undertaken by them must depend upon the question of potential injury which is pertinent in every case of misconduct and irregularity. Much depends upon what they read and whether, in view of their lack of discretion, there is a probability that confusion was created in their minds as to the rights of the parties, or their attention was diverted from the issue upon which they were to pass and fixed upon subjects foreign to such issue. In other words, a new trial should not be granted for this cause unless the showing for it has the support of the reasons which forbid this particular species of misconduct.⁸³ Nevertheless, it is always wrong for jurors to examine law books with a view to determining for themselves the law of the case before them, and if done by leave of the court, or if the books are furnished them by the court, as occurred in one case, it is also an irregularity of the court. In that case the appellate court clearly pointed out the evils which might result from these independent investigations by juries as to the law of cases, saying: "Everyone familiar with the practice of the law and the administration of justice in our courts knows that cases not infrequently turn on nice distinctions, and that the most simple and common rules are difficult of application, and that it often requires careful study, nice discrimination, and a well-instructed mind to perceive the distinction on which the decision of cases depends. Certainly they cannot be apprehended in the brief time allotted to the deliberations of the juryroom. Indeed, we know of no method that could be adopted which would more effectually tend to confuse the minds of jurors and to mislead them in the proper discharge of their duty than to permit them to read or refer to law books during their consultation, for the purpose of ascertaining the rules of law which were applicable to the cases which are sub-

⁸² *Forehand v. State*, 51 Ark. 553, 11 S. W. 766. See, also, *McCoy v. State*, 78 Ga. 490, 3 S. E. 768.

⁸³ *Merrill v. Nary*, 10 Allen (Mass.), 416.

such misconduct as authorized the setting aside their verdict.⁸⁶ But where, in a prosecution for an assault with intent to commit rape, one of the jurors read in the juryroom during the deliberations the provisions of the code on that subject, and also read the provisions governing motions for new trials, it was held the verdict should be set aside and a new trial granted.⁸⁷

**§ 162. Receiving papers other than those designated by law—
Files and other documents.**

One of the most objectionable forms of misconduct under this head is where extraneous evidence is received and examined in the form of documents falling into the hands of the jury, whether by inadvertence or design, which were not intended for them and are not included among those designated in statutes specifying the papers that may be taken with the jury when they retire to consider of the verdict. And if papers not so included be taken, and the same be calculated to influence their minds, in favor of the prevailing party, and thus affect the verdict, it will usually entitle the losing party to a new trial. Nor, in such case, is it necessary for him to show affirmatively the effect which the consideration of such papers had upon the minds of the jury.⁸⁸ Accordingly, where, in an action against a railroad company for negligence resulting in the death of an engineer, the testimony taken at the inquest inadvertently got into the hands of the jury, was taken to their room and read by them, although it had not been admitted in evidence, it was held that, as its nature was such that it might have influenced the jury in finding a verdict, the verdict was properly set aside and a new trial granted.⁸⁹ And

⁸⁶ *Bernhardt v. State*, 82 Wis. 23, 51 N. W. 1009.

⁸⁷ *Harris v. State*, 24 Neb. 803, 40 N. W. 317.

⁸⁸ *Kruidenier v. Shields*, 77 Iowa, 504, 42 N. W. 432. In this case the jury compared a receipt not in evidence, but which purported to be in the handwriting of a party, but which was not, with a note in evidence, which the party testified he had signed, and thus discredited his testimony and found against him. A new trial was ordered.

⁸⁹ *McLeod v. Humeston etc. Ry. Co.*, 71 Iowa, 138, 32 N. W. 246.

a reversal and new trial was ordered where a dying declaration was permitted by the court to go into the juryroom for the investigation of the jury.⁹⁰ In this case the court said: "Again, it is claimed that the court erred in allowing the dying declaration to go to the juryroom, for the investigation of the jury, over the objections of the appellant. We think, without any question, that this was reversible error. The statute does not permit witnesses or depositions to go to the juryroom, and for the very best of reasons. And certainly the dying declaration is in substance a deposition of a witness, the solemnity of the occasion simply taking the place of the oath which is ordinarily administered to a witness who subscribes to a deposition. No cases are cited on this proposition, but we think that it so plainly falls within the ban of the statute and the law that the citation of authorities is unnecessary." But in the instance just mentioned, the paper contained not only the dying declaration, which, under the Washington statute it was within the discretion of the court to send to the jury, but a question propounded to the deceased and the answer thereto, which constituted no part of the dying declaration proper. In the subsequent case of *People v. Webster*⁹¹ the main dispute was as to whether a bottle containing whisky and one containing cantharides and other drugs were covered by the statute designating what papers and exhibits the court might send out with the jury, and the court held that they were. As the Washington statute on the subject is the same as that of California and several other states, the views of the court in the Webster case are here inserted. Reavis, J., delivering the opinion, said: "After the court had instructed the jury, it directed that the bottle of whisky, the bottle of cantharides, and that of saxe-line or vaseline, might be taken by the jury, together with the papers in the case. Counsel for defendant assign this as error, under section 5004 of Ballinger's Code. This section directs what may be taken by the jury to their consultation-room, to wit, the pleadings in the case, all papers which have been received as evidence on the trial, except depositions and copies of such parts of the public records or private documents given in evi-

⁹⁰ *State v. Moody*, 18 Wash. 165, 176, 51 Pac. 356.

⁹¹ 21 Wash. 63, 71, 57 Pac. 361.

dence as ought not, in the opinion of the court, be taken from the person having them in possession. But the objection of counsel is met by the very well-considered case of *Doctor Jack v. Territory*,⁹² in which the above section, which has been the existing law of the state and territory for many years, is construed. There it was held that exhibits properly introduced in evidence, and explanatory of the evidence of witnesses, might be taken to the juryroom [in that case, which was a conviction for murder in the first degree, a hat and coat, which were exhibits in the case, were taken to the juryroom]; and such has been the practice and the accepted construction of this section since then." The supreme court of California has also held that the sending of exhibits to the juryroom or withholding them is within the discretion of the court. In *People v. Cochran*⁹³ it was held that the court, at the trial, had properly denied the request of defendant's counsel to let the jury, upon retiring for deliberation, take with them a diagram which had been used at the trial of the cause, in the examination of some of the witnesses. Of course, a diagram so used is not an exhibit, nor one of the "papers," as the term is used in the statute, all of which the court explained. But the court took occasion to construe the California statute. Section 1137 of the California Penal Code provides that "upon retiring for deliberation the jury may take with them all papers which have been received as evidence in the case, except depositions, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession," etc. The court said: "The statute is not mandatory. It directs the court to allow the jury to take with them any papers received as evidence which may be of service to them in making up their verdict, but none can be taken without permission of the court. The matter is therefore left to the sound discretion of the court, and its action is not revisable unless there has been an abuse of discretion." Whether the taking or sending of the indictment, with indorsements thereon showing a prior conviction, will entitle a defendant to a new trial, seems to be unsettled. In view of the unsettled state of the law as declared by decisions, it may be well to state the view of a federal court

⁹² 2 Wash. Ter. 101, 3 Pac. 832.

⁹³ 61 Cal. 548.

of high character on this question. In a recent case⁹⁴ it was held that the fact that, on the retirement of the jury in a criminal case, an officer of the court handed to them the indictments upon which the defendant was tried, which were taken into the juryroom with the other papers for their consideration, and that, indorsed on the back of each of such indictments, was the verdict of a former jury finding the defendant guilty as charged therein, was such a violation of the rights of the defendant as to entitle him to a new trial. And the opinion also declared that it was not incumbent on the defendant to show that such indorsements were actually read by the jurors or any of them.

§ 163. Documents and writings from outside sources.

Equally objectionable, and likewise ground for a new trial, if equally calculated to influence the verdict, with papers used in court but not put in evidence, are papers from outside sources, coming into the hands of the jury during their consideration of the case, whether before or after their final retirement. Thus, when in an action to recover a penalty for obstructing a public highway, the jury used a map of the county in which such highway was situated, such map not having been put in evidence, it was held such prejudicial conduct on their part as entitled the losing party to a new trial.⁹⁵ And where, in a prosecution for libel, the jury got possession of a pamphlet containing the alleged libel and read portions thereof not admitted in evidence, it was held that they had "received evidence out of court," and a new trial should be granted.⁹⁶ It ap-

⁹⁴ *Ogden v. United States* (C. C. A.), 112 Fed. 523.

⁹⁵ *State v. Hartman*, 46 Wis. 248, 50 N. W. 193.

⁹⁶ *People v. Thornton*, 74 Cal. 482, 16 Pac. 244. The court in reversing the judgment and ordering a new trial, said: "The charge of libel is based upon a single paragraph embracing two or three lines only of the pamphlet, which consists of many pages of libelous matter. It is stated in one of the affidavits used on the motion for a new trial that one of defendant's counsel, in his argument to the jury, read some portions of the pamphlet. How much of what portions is not stated. The pamphlet was received in evidence as a whole, while parts of it only were read in the presence of the jury before they retired. If the portions read in the presence of the jury, after they had retired, were not read in their presence, before

pears that if a paper or writing so introduced to the jury be not produced when the question is brought up for review on motion for new trial, and the character of its contents then shown to have been harmless, there will arise a presumption that it was of a prejudicial character, so that the losing party will be entitled to a new trial without proof as to its contents. In *State v. McCormick*,⁹⁷ the facts, the question before the court, and the supreme court's view of the law all appear in the following quotation from the opinion: "A number of questions have been presented upon the appeal, which will not be considered, as they are not likely to arise upon a retrial, and the cause must be reversed upon the fourth error assigned. It is based upon the following facts: After the jury had retired to consider the case, the court authorized two letters and a paper to be delivered to certain of the jurors. This matter was presented in a motion for a new trial, whereupon the court made the following statement, which is incorporated in the record: 'Yesterday, during the noon recess and just before court convened, the bailiff, Mr. Aubin, handed me two letters addressed to two of the jurors then serving upon the jury in this case, and wanted my permission to deliver such letters to the jurors addressed, and also at the same time a newspaper. After examining the letters and seeing that they were both from a considerable distance from Stevens county, and had been in transit for several days, said bailiff was permitted to deliver the letters to the jurors addressed, and, examining the paper and seeing that it contained nothing relative to this cause, permitted it to be delivered to the juror.' The matter was not submitted to the defendant for his permission, and we think it

they retired, we think they may have received evidence out of court, as the paragraph upon which the charge of libel is based is one of the mildest of an innumerable number of libels contained in the pamphlet. No part of it could be read without reading a libel of a very damaging character. The propriety of permitting the jury on retiring for deliberation to take with them said pamphlet was not considered by the court or counsel. The jury did not take it with them. They found it after they had retired. By listening to the reading of it, we think they must have received evidence out of court, which, on retiring for deliberation, they did not take with them. That, in our opinion, entitles the defendants to a new trial."

⁹⁷ 20 Wash. 94, 96, 54 Pac. 764.

was error for the court to send the letters in question to the jurors for whom they were intended. It is the intention of the law that jurors in all actions shall be most carefully guarded from outside influences; and, while it is probably true, in this case, that the documents sent in did not influence them in arriving at their verdict, it is possible that they did so. It is certainly conceivable that the envelopes containing the letters might have been opened and communications to the jury inserted therein, and the envelopes again sealed in such a manner as to escape detection. There is no claim that the court opened or examined the letters. It is not necessary to establish that the letters did contain anything damaging to the defendant. The opportunity was given, and the fact that they might have contained something of the kind is sufficient." In *Territory v. Doyle*⁹⁸ it was held that the trial court had discretion, in the absence of a statutory prohibition, to permit the jury to take a memorandum-book containing a diary and a table of distances between certain points, which had been found on the person of a defendant prosecuted for grand larceny. In all such instances the party complaining must show, on motion for new trial, that he and his counsel were ignorant of the fact until after the trial. If either of them have knowledge of such fact before the return of the verdict, it must be promptly called to the attention of the court, since any prejudicial effect may be usually prevented or removed by an instruction or caution given by the court, and thus a new trial obviated.⁹⁹

§ 164. Oral communications from outside sources—From parties and counsel.

Where communications have been intentionally transmitted to the jury from the prevailing party, or his counsel, or from his other agents, or from those standing in privity or close relation with him, if such communications, upon being proven, appear to have been calculated to prejudice the minds of the jury, a new trial will be granted, without a showing of actual prejudice,¹⁰⁰ and circumstances may warrant a new trial in

⁹⁸ 7 Mont. 245, 14 Pac. 671.

⁹⁹ *Barnes v. Commonwealth*, 101 Ky. 556, 41 S. W. 772.

¹⁰⁰ *Briggs v. Rowley*, 7 Ohio N. P. 651. See, also, *Hoffman v. Gallup*, 55 Me. 365, where a juror requested and obtained from the

the absence of a showing of what passed between a party interested in the litigation and the jury; for instance, where the defendant, the sheriff, upon being requested by the court to ascertain when the jury would probably agree, mingled and conversed with them.¹⁰¹ In *People v. Dunne*¹⁰² it was held that the fact that during the trial one of the jurors engaged in close and earnest conversation with the prosecuting witness did not of itself warrant the ordering a new trial, or raise a presumption that the juror was thereby improperly influenced. But Sharpstein, J., delivering the opinion, remarked that such conduct was "inexcusable." No authorities were cited, and the decision is not in harmony with the great weight of authority. In *People v. Phelan*¹⁰³ the jury were permitted to separate during the trial, in the exercise of the court's discretionary power; and, during one of such separations, one of the jurors conversed with a brother of the deceased, the nature and subject of the conversation not appearing. The trial court denied the motion for new trial, based upon this and other grounds. Beatty, C. J., delivering the opinion on the appeal, said: "We cannot say that this ruling was error calling for a reversal of the judgment, although we do think it would have been a wise exercise of the discretion of the court to investigate fully these charges of misconduct. It was not legal misconduct in a juror to engage in conversation with a brother of the deceased upon a subject disconnected with the case on trial, but it was a grave impropriety, exposing the juror to suspicion and reflecting upon the administration of the law. It is not going too far to say that his conduct called for explanation. But this was a matter

defendant, a pamphlet, not in evidence which contained the evidence introduced at a previous trial of the same suit: *Olson v. Meador*, 40 Iowa, 663, where a juror after the close of the argument asked plaintiff's counsel a question, as to the law of the case, which the latter answered.

¹⁰¹ *Peterson v. Siglinger*, 3 S. Dak. 255, 52 N. W. 1062. See, also, *Shaw v. State*, 83 Ga. 92, 9 S. E. 768, where the bailiff, during an adjournment, took the jury to a prayer meeting, conducted by the prosecuting witness, and it was held that, although no one spoke to them while there, the verdict must be set aside, and a new trial granted.

¹⁰² 80 Cal. 34, 36, 21 Pac. 1130.

¹⁰³ 123 Cal. 551, 567, 56 Pac. 424.

resting in the discretion of the trial court, and, since it does not appear that the conversation related to the case on trial, we cannot hold that there was abuse of discretion." In this case there was no legal reason for reversal on this ground. The conversation was between the juror and a brother of the deceased, but it does not appear that he was the prosecuting witness. It is evident, from the language of the court, that if such legal grounds had existed the judgment would have been reversed and a new trial ordered.

§ 165. Oral communications from outside sources—From others than parties—When harmless.

A different rule applies to merely oral communications transmitted to the jury from outside, and presumably disinterested sources, from that applicable where documents and writings are transmitted, or intercourse is had, between parties, or those interested with, or standing in close relation to them, and the jury. A verdict will not usually be set aside because of such outside oral communications unless the nature thereof be shown and appear calculated to prejudice the rights of the complaining party.¹⁰⁴ Accordingly, it was held that the conversation of a juror, pending the jury's deliberations, with a person not a juror, must be such as was calculated to impress upon the mind of the juror the case under consideration in a different aspect from the one made by hearing the evidence, or of such nature as would work harm to the party on trial; otherwise such conversation was no ground for a new trial.¹⁰⁵ And mere casual, open conversation between a juror and the bailiff was considered of no importance.¹⁰⁶ So, where the jury, by sanc-

¹⁰⁴ *McCash v. City of Burlington*, 72 Iowa, 26, 33 N. W. 346; *Caswell v. Pitcher* (Me.), 10 Atl. 453. The fact that a juror was permitted to telephone instructions to his place of business, held, not without further showing, ground for new trial: *West Chicago St. Ry. Co. v. Lundahl*, 183 Ill. 284, 55 N. E. 667.

¹⁰⁵ *Nance v. State*, 21 Tex. App. 457, 1 S. W. 448.

¹⁰⁶ *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948. For other instances of unimportant or harmless conversations, see *State v. Robinson*, 106 Tenn. 204, 61 S. W. 65; *State v. Kyne*, 10 Kan. App. 277, 62 Pac. 728. In both these cases the judge was arranging to prevent the jury being tampered with. See, also, *State v. Crane*, 110 N. C. 1530, 15 S. E. 231; *King v. State*, 91 Tenn. 617, 20 S. W. 169.

tion of the court and consent of the defendant, attended church in a body, it was held that defendant could not urge as ground for new trial that the sermon was of such character as to prejudice him, it appearing to have been an ordinary emanation from a Christian pulpit.¹⁰⁷ On the same principle, the attendance of the jury upon a theatrical performance before introduction of evidence was begun was held to be no ground for new trial.¹⁰⁸ And, where a juror stopped at a store and ordered goods sent to his residence, it was held no ground for new trial without a further showing.¹⁰⁹ Nor was the sending a sworn interpreter into the juryroom to interpret between jurors who spoke Spanish and others English any ground for a new trial, unless defendant showed prejudice.¹¹⁰ And, in order that the mere prejudice of the sheriff in charge of the jury may avail a party seeking a new trial, it must be shown that he manifested prejudice by some word or act prejudicial to that party.¹¹¹

§ 166. Same—Prejudicial.

But where communications have taken place, which are calculated either by reason of their character alone, or in connection with the attendant circumstances to prejudice the jury against the losing party, a new trial usually is granted. Accordingly, where after acts of flagrant misconduct on the part of four of the jurors, in visiting a material witness for defendant, in a murder case, and after a severe reprimand by the court, which was published in the newspapers, the sheriff told the jury that if a disagreement was brought about by those of their number guilty of the misconduct, "there will be hell to pay," it was held that a conviction should be set aside, since the only way the jury could free themselves from suspicion was by a conviction.¹¹² And it was held the ver-

¹⁰⁷ *State v. Pancoast*, 5 N. Dak. 516, 67 N. W. 1052.

¹⁰⁸ *Moore v. People*, 26 Colo. 213, 57 Pac. 857.

¹⁰⁹ *State v. Church*, 6 S. Dak. 89, 60 N. W. 143.

¹¹⁰ *Thomason v. Territory*, 4 N. Mex. 150, 13 Pac. 223.

¹¹¹ *State v. Rush*, 95 Mo. 199, 8 S. W. 221.

¹¹² *People v. Mitchell*, 100 Cal. 328, 34 Pac. 698. Several circumstances and considerations, besides the mere words of the sheriff, influenced the decision of reversal in this case. The court said (in

dict should be set aside and a new trial granted where some of the jurors, at their boarding-house, heard the merits of the cause discussed, and one of them, on at least one occasion, joined in the discussion, and expressed an opinion on a vital point of the case,¹¹³ so where the jury viewing the scene of the crime interrogated a passer-by as to the identity of a house, whose distance from the scene of the crime was material, thus eliciting other evidence than that offered on the trial, a new trial was ordered.¹¹⁴ In another case it was held that the delivery to a jury, after it had retired, by the sheriff in charge of them, of a written paper prepared by him, and containing extracts from the code relating to the law of the

part): "That four of the jurors should have visited this place indicates a lack of that high appreciation of the duties and responsibilities of jurors essential to the purity of the jury system, is quite apparent. That one, at least, if not two of them should have repeatedly visited such a place under such circumstances, and there conversed in reference to the case on trial, a case which involved the life and liberty of a man whose home was there, the place around which clustered many of the prominent actors and acts in the case, furnishes indubitable proof either of a willingness to do wrong, or, what is more probable, an entire lack of any adequate conception of the position which, as jurors, they occupied. It may appear at first blush that the friend and witness of defendant, having been largely instrumental in bringing about the condition of which he complains, it cannot be presumed that he was injured thereby, and that to yield to his plaint will result in encouraging other men charged with crime to resort to like practices. This is but a surface view of the case, and, when we go deeper, we find that the jurors in question had compromised themselves; that their position had been exposed; that the public was watching them with a suspicious eye, and that henceforth they could only allay that suspicion; and vindicate themselves from it by convicting the defendant. Their freedom of action was foreclosed. Amid all the notoriety given to their conduct there can be no reasonable doubt but that the jurors understood fully the unfortunate position in which they were placed, and the temptation to escape by the most practicable mode, viz., by convicting the defendant, was too strong a one to be reasonably resisted by such men under such circumstances. It is plain that all this tended to the injury of the defendant, and a verdict rendered under such circumstances should not be upheld."

¹¹³ Campbell v. Chase Granite Co., 92 Me. 90, 42 Atl. 228.

¹¹⁴ State v. Perry, 121 N. C. 533, 61 Am. St. Rep. 683, 27 S. E. 997.

offense charged, and the examination of this paper by the jurors, was cause for a new trial, although the verdict finally rendered might have been agreed upon in the juryroom by all the jurors before this paper was received or read by them.¹¹⁵ And it is sufficient reason for setting aside a verdict for a person other than a juror to sleep in the juryroom with the jury pending the trial, and make statements to one or more of them reflecting on the character of the party against whom the verdict was subsequently rendered.¹¹⁶ Sometimes it is not necessary to show that any particular person conversed with the jury, it being sufficient that they were subjected to general comment on the merits of the case in a promiscuous assemblage. Accordingly it was held that the fact that after the cause was submitted to the jury some of the jurors were allowed to stand on the courthouse porch, where they could hear citizens discussing the merits of the case, and insisting on defendant's guilt, was ground for setting aside a verdict of guilty and granting a new trial.¹¹⁷

§ 167. When prejudicial communications presumed from improper association without more appearing.

And in some instances new trials have been granted by reason of extreme impropriety in the conduct of the jury, or of persons in charge of them. Whereby they were brought into contact with outsiders and thus afforded an opportunity to hold prejudicial communication about the case, without proof of anything having been in fact said or communicated. Thus it was held sufficient reason for setting aside the verdict and ordering

¹¹⁵ *Cooper v. State*, 101 Ga. 783, 29 S. E. 22. See, also, *Wilkinson v. State*, 78 Miss. 356, 29 South. 170, where it appeared that after the jury had deliberated for an hour, a juror asked the bailiff the difference between burglary and larceny and between burglary and petit larceny, and the bailiff answered that he would send the prisoner to the penitentiary, and the others to the county farm, whereupon a verdict of guilty was immediately returned for the latter offense. New trial was ordered. Also, *Hogan v. State* (Tex. Civ. App.), 28 S. W. 949, where new trial was granted for improper communication from the sheriff in charge to the jury.

¹¹⁶ *Welch v. Taverner*, 78 Iowa, 207, 42 N. W. 650.

¹¹⁷ *Vaughan v. State*, 57 Ark. 1, 20 S. W. 588.

a new trial, where a bailiff remained in a room with the jury while they were considering the verdict, nothing more appearing.¹¹⁸ So where, during their deliberations, the jury occupied the courtroom, and nine persons connected with the court, two of whom testified for the state, remained therein, the conviction was set aside, although it did not appear that any of such persons spoke to the jurors, except the clerk, who asked them if they were likely to agree on a verdict.¹¹⁹

§ 168. Oral statements by jurors to fellow-jurors—General view.

It frequently occurs that jurors interchange knowledge acquired prior to and during the trial. It oftener occurs than is evidenced by judicial records on motions for new trial or otherwise. Probably few cases are tried by juries of the vicinage—as the law requires they shall be, unless the venue is changed—that all the jurors are without personal knowledge of some vital phase of the litigation, however free from bias when sworn, and however conscientiously they may have answered upon voir dire examination. And it would be placing too great a stress upon credulity and exacting too much of natural inclination to believe that in more than one-half such instances jurors thus possessing personal knowledge, refrain at all stages of the trial from imparting it to one or more of their fellows, admonitions and oaths to the contrary, notwithstanding. Only a hasty examination of the Texas decisions under the head of new trials is required to convince one of this weakness of the average juror. In that state, the affidavits of jurors are received to prove as well as to disprove misconduct. It is undoubtedly due to the general prevalence of the rule excluding the affidavits of jurors, when sought to be used to impeach their verdicts, that so few cases of this particular species of misconduct have reached the appellate courts. It does not necessarily follow that they are by reason of possessing such knowledge, less fair or less impartial, or that others to whom they impart it are less so. Nevertheless its communication to fellow-jurors constitutes very serious misconduct, and a very strong plea for a new trial when

¹¹⁸ Gandy v. State, 24 Neb. 716, 40 N. W. 302.

¹¹⁹ Tarkington v. State, 72 Miss. 731, 17 South. 163.

shown on the motion, if the matter so communicated be material to the issue, especially if the evidence be almost evenly balanced. In determining the question whether statements made by a juror to fellow-jurors should entitle the losing party to a new trial, the supreme court of Louisiana proposed as a test the question whether the juror making the statement was, with the knowledge possessed by him, a fit and proper person to serve on the jury.¹²⁰ It would be difficult to find fault with this test. But in many instances other tests have been applied. It is, perhaps, more proper to say, other reasons have been sought for the particular decisions rendered. Thus in *Booby v. State*,¹²¹ the defendant was on trial for receiving stolen goods. After the jury had retired to their room, one of them stated to the rest that the defendant had stolen a hog in the county and made other statements on information. The judgment of conviction was reversed, and a new trial ordered. In course of the opinion, the court said: "What the juror knew of the defendant ought to have been proposed, and offered in court, and if admissible, there rendered. The contrary course that has taken place in this cause, is directly against and repugnant to the constitution of this state, which says: 'That, in all criminal prosecutions, the accused hath a right to be heard by himself, and his counsel, and to meet the witnesses face to face.'"

§ 169. Same—Illustrations.

Although the sworn secrecy of the juryroom and the almost universal exclusion of the affidavits of jurors to incriminate themselves or their fellows is an almost insuperable obstacle to the procurement of satisfactory proof of this species of receiving evidence out of court, the reported cases show the extreme disfavor with which courts have looked upon it, in the cases coming before them. And it may be stated as a general rule that where a juror states to his fellow-jurors any material fact within his own knowledge, without being regularly sworn and ex-

¹²⁰ *State v. Cook*, 32 La. Ann. 114, 26 South. 751.

¹²¹ 4 Yerg. (Tenn.) 111. To same effect, *Wood River Bank v. Dodge*, 36 Neb. 708, 55 N. W. 234. See, also, *Truman v. Bishop*, 83 Iowa, 697, 50 N. W. 278; *Brusnitz v. Navigation Co.*, 64 Hun, 262, 19 N. Y. Supp. 75; *Garside v. Watch Case Co.*, 17 R. I. 691, 24 Atl. 470.

amined as a witness, a new trial should be granted.¹²² It is cause for setting aside the verdict and granting a new trial for a juror to relate other crimes which the defendant in a criminal case has committed within his knowledge;¹²³ or of which he has been convicted;¹²⁴ or that he is a person of bad character, his character not having been put in issue;¹²⁵ or to com-

¹²² See *Richards v. State*, 36 Neb. 17, 53 N. W. 1027; *State v. Woods*, 49 Kan. 237, 30 Pac. 520; *State v. Beam*, 1 Kan. App. 638, 42 Pac. 394; *Buessing v. State* (Tex. Cr. App.), 63 S. W. 318, where in addition to making statements from personal knowledge, plats were drawn from such personal knowledge: *Wilberding v. Dubuque* (City of), 111 Iowa, 484, 82 N. W. 957; *Bohn v. Chicago etc. Ry. Co.* (Iowa), 78 N. W. 200.

¹²³ *Mitchell v. State*, 36 Tex. Cr. App. 278, 33 S. W. 367, 36 S. W. 456; *Holmes v. State*, 38 Tex. Cr. App. 370, 42 S. W. 996; *Ryan v. State* (Tenn.), 35 S. W. 930. And it was held that a recital by a juror of another case within his knowledge, and an argument therefrom that defendant was guilty, warranted a new trial: *Barnes v. State* (Tex. Cr. App.), 65 S. W. 922. It would seem that this was legitimate lines of argument to which a juror should be permitted to resort.

¹²⁴ *Darter v. State*, 39 Tex. Cr. App. 40, 44 S. W. 850; *Ysaguirre v. State* (Tex. Cr. App.), 58 S. W. 1005; *Hardinan v. State* (Tex. Cr. App.), 53 S. W. 121; *State v. McCormick*, 57 Kan. 440, 57 Am. St. Rep. 341, 46 Pac. 777.

¹²⁵ *State v. Parker*, 25 Wash. 405, 65 Pac. 776. In *Morton v. State*, 1 Lea (Tenn.), 498, 499, the court said: "It appears that while the jury was considering its verdict one of the jurors stated to his fellows 'that the prisoner had heretofore stolen sheep, money, and other things from his father.' Such conduct on the part of a juror is quite reprehensible, and will always prejudice the accused. Courts should distinctly charge juries in criminal cases that they must look alone to the testimony adduced in the evidence before them on the trial, and should not permit one of their number to communicate to them any fact in his knowledge not deposed to in court. Arrest the judgment and remand the prisoner." In *Atchison etc. R. R. Co. v. Bayes*, 42 Kan. 609, 611, 22 Pac. 741, the court said: "The alleged misconduct of Hutchinson is specifically set forth in the motion. Upon the hearing of the motion two of the jurors, M. A. Ebaugh and W. J. Iliff, were examined as witnesses. Ebaugh testified, among other things, that during the deliberations of the jury, Hutchinson stated to the other members of the jury that some of his (Hutchinson's) hedge had been burned in the same manner as the plaintiff's hedge, by the same company, and that the company had paid him one dollar and fifty cents a

ment upon his failure to testify in his own behalf, drawing inferences unfavorable to him.¹²⁶ And a new trial was granted where a juror informed his fellow-jurors that the defendant was equally guilty with a codefendant (who had confessed) because both were members of a certain "tough gang."¹²⁷ Jurors also exceed their proper limitations by making statements of matters and transactions within their own knowledge reflecting upon the character and veracity of witnesses.¹²⁸ And recitals by jurors of personal dealings with parties to the litigation commendatory or condemnatory if prejudicial in tendency to the losing party, warrant a new trial.¹²⁹ And though, in a criminal case the prejudicial statement is not made until after the defendant's guilt is agreed upon, yet if made in connection with the fixing upon the punishment, a new trial will be granted.¹³⁰ The facts stated in the juryroom need not, in order to defeat the verdict, be such as were known to the jury when they were impaneled and sworn. If they acquire knowledge otherwise than through the established channel during the

trial as his damages for it. . . . We think the motion for a new trial ought to have been granted, because of the statement made by the juror, Hutchinson, in the juryroom during the deliberations of the jury. Except for that statement the verdict of the jury might not have been rendered for the amount for which it was rendered." And in *Hall v. Robinson*, 25 Iowa, 91, 93, the following language is found: "A juror has no right to give testimony or state facts outside the case made in court to his fellow jurors, after their retirement and for their consideration in making up the verdict in the case. The only proper way in which facts known to a juror can be given to his fellow-jurors, is by having such juror sworn to testify as a witness." See, also, *State v. Woods*, 49 Kan. 237, 30 Pac. 520; *Mason v. State*, 29 Tex. App. 608, 16 S. W. 766.

¹²⁶ *Wilson v. State*, 39 Tex. Cr. App. 365, 46 S. W. 251; *Thorpe v. State*, 46 Tex. Cr. App. 346, 50 S. W. 383; *Beard v. State* (Tex. Cr. App.), 65 S. W. 905.

¹²⁷ *State v. Parker*, 25 Wash. 405, 65 Pac. 776.

¹²⁸ *Blalock v. State* (Tex. Cr. App.), 62 S. W. 571.

¹²⁹ *Atchison etc. R. Co. v. Bayes*, 42 Kan. 609, 22 Pac. 741; *Ritchie v. Holbrooke*, 7 Serg. & R. (Pa.) 458, where the foreman of the jury undertook to explain complications in plaintiff's accounts, informing them that the plaintiff had satisfactorily explained the matter to him.

¹³⁰ *Hughes v. State* (Tex. Cr. App.), 67 S. W. 104.

trial, it will vitiate the verdict and entitle the party against whom it is returned, to a new trial. Thus in *Brunson v. Graham*,¹³¹ an action on the case for the nonperformance of a contract respecting the transfer of stock a new trial was granted the defendant for the reason that after the final retirement of the jury, one of them applied to a broker, and obtained from him information respecting the price of certificates of the stock at a particular period, which information he communicated to the other jurors.

§ 170. Same—Proper scope of discussion between jurors not invaded.

Of course, there is no law forbidding jurors discussing the evidence freely among themselves, and debating the merits of the case. No remark by jurors can properly be termed prejudicial if the evidence before them shows its truth.¹³² For instance, where there is evidence touching the character of the accused, it is not misconduct for the jury to discuss his character, within reasonable limits.¹³³ So, where, in an action for personal injuries, a juror stated and explained by a model in evidence that if certain precautions had been taken the accident would not have happened, it was held not such misconduct as required a new trial, since what he said and demonstrated was a self-evident fact and in keeping with the evidence.¹³⁴

§ 171. Same—Prejudicial effect—Presumption.

There is not, according to the large preponderance of authority, any deviation in this species of misconduct from the general rule, that if the juror's statement has a direct tendency, or, as usually expressed, be calculated, to prejudice the other jurors against the losing party, a new trial should be granted upon the

¹³¹ 2 Yeates, 166.

¹³² *State v. Copeland*, 106 Iowa, 102, 76 N. W. 522. Nor are expressions by jurors of opinions concerning the punishment fixed by law for the offense under consideration deemed important: *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

¹³³ *Brice v. State* (Tex. Cr. App.), 61 S. W. 121.

¹³⁴ *Monaghan v. Pacific Rolling Mill Co.*, 81 Cal. 190, 22 Pac. 590.

presumption of injury which arises.¹³⁵ Another question relates to the admissibility of the testimony of jurors and others to rebut such presumption. Both these questions and the authorities thereon are considered under an appropriate head, elsewhere.¹³⁶

§ 172. Duty of injured party herein—Removal of prejudicial effect by instruction.

It is the duty of a party who considers himself aggrieved by statements of jurors to other jurors, as in other instances of misconduct to avail himself of the earliest opportunity, if an opportunity should present itself, to call the same to the attention of the court, and ask that an endeavor be made to remove any injurious effect thereof by caution and instruction. And, although there are exceptions, it is generally held that a new trial may be obviated by a timely and proper instruction.¹³⁷ And in one case, it was held that the interposition and protest of the foreman against the mention of an outside matter, whereupon there was no further mention of it, was a sufficient answer to the moving party.¹³⁸

§ 173. Reading public prints.

In all jurisdictions, and in all recent times, a liberal policy has been adopted by courts with reference to the liberty of the press; and with reference to judicial proceedings a considerable range or criticism is reluctantly conceded. With reference to the contents of public prints referring to cases on trial, substantially the same rule applies as to other statements by outsiders, while the jurors are kept together in charge of an officer. If allowed to separate during the trial, the futility of restraint as to reading newspapers and periodicals is generally recognized, though, theoretically, at least, the same rule applies as to other prohibited communications. The sense of propriety, power to

¹³⁵ See *Wright v. Eastlick*, 125 Cal. 517, 58 Pac. 87. See, also, *People v. Montague*, 71 Mich. 447, 39 N. W. 585, giving effect to considerations of public policy herein.

¹³⁶ See post, §§ 406-411.

¹³⁷ See *Levan v. State*, 114 Ga. 258, 40 S. E. 252.

¹³⁸ *Moore v. People*, 26 Colo. 213, 57 Pac. 857.

discriminate, and the common tendency to discredit newspaper reports and comments, may be relied upon as a reasonable safeguard against undue influence from such sources, where the case is not deemed of sufficient importance or public interest to warrant keeping the jury together during the trial. In important cases jurors are usually placed in charge of sworn officers and admonished as to reading newspaper articles on the subject of the litigation and the officers directed not to permit any newspapers containing such articles to be delivered to jurors. If, notwithstanding such admonitions and instructions, such articles are received by the jurors and read, the only remaining question is as to the character of the matter so read, and its tendency to create prejudice in the minds of the jury. The reading of prohibited articles, no matter who is responsible for their reaching the juror, is misconduct on the part of the latter. If delivered by a party in whose favor a verdict is subsequently rendered, the other party may assign it under the head of irregularity of the adverse party, as well as under the head of misconduct of the jury; but without reference to the responsible agency, it is misconduct of the jury.¹³⁹ And a defendant was held entitled to a new trial where the jury obtained and read, during the trial, newspaper reports of the evidence, colored by the feelings of the reporter, favorably to the prosecution, the report being accompanied by remarks unfriendly to the defendant.¹⁴⁰ So the taking by jurors and perusal of newspapers containing reports of the evidence and arguments of counsel, praising the arguments for the state, and criticizing the failure of courts to bring criminals to justice, was held misconduct warranting reversal and new trial.¹⁴¹ The rule against prejudicial publications has no application where the newspaper merely states the evidence correctly as represented in the record, and

¹³⁹ *People v. Murray*, 85 Cal. 350, 24 Pac. 666; *Morse v. Montana Ore-Purchasing Co.*, 105 Fed. 377; *United States v. Ogden* (C. C.), 105 Fed. 377. For a case in which prejudicial publications were held sufficient to warrant granting a new trial without special showing that they influenced or were read by jury, see *Meyer v. Cadwalader* (C. C.), 49 Fed. 32.

¹⁴⁰ *Cartwright v. State*, 71 Miss. 82, 14 South. 526.

¹⁴¹ *State v. Walton*, 179 Iowa, 455, 61 N. W. 179.

contains nothing calculated to mislead the minds of the jury.¹⁴² Nor do state courts, as a rule, take notice of general abuse, misrepresentation and violent language of and concerning defendants on trial in criminal cases, or of articles calculated to intimidate and coerce the jury in the absence of proof that the same was actually read by at least part of the jurors.¹⁴³ On the question, whether the reading by jurors of newspaper articles prejudicial to one of the litigants is per se ground for new trial, without further showing, there is considerable conflict of authority, many cases holding the affirmative,¹⁴⁴ and others the negative.¹⁴⁵ The consideration of questions of presumption and evidence is deferred.¹⁴⁶ A new trial for such misconduct may usually be obviated, as in other cases, by instruction, caution and criticism on the part of the court, if brought to its attention in due time.¹⁴⁷

§ 174. Disclosing secrets of juryroom.

The disclosure of the secret proceedings of the juryroom or, prematurely, of the agreement reached, is a violation of the oaths of jurors, a flagrant contempt of court, and misconduct of the most serious aspect. But it is not directly of such serious effect as is further misconduct to which it may lead, and the opportunity it may afford for corruption being practiced. The very act of disclosure, however, often involves prejudicial communication with parties or other outsiders. A clear case for a

¹⁴² *People v. Leary*, 105 Cal. 486, 39 Pac. 24.

¹⁴³ *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *Fogarty v. State*, 80 Ga. 450, 5 S. E. 782.

¹⁴⁴ See *People v. Stokes*, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207; *People v. McCoy*, 71 Cal. 395, 12 Pac. 272; *West Chicago St. R. Co. v. Grenell*, 90 Ill. App. 30; *State v. Walton*, 92 Iowa, 455, 61 N. W. 179; *Cartwright v. State*, 71 Miss. 82, 14 South. 526; *United State v. Ogden (C. C.)*, 105 Fed. 371.

¹⁴⁵ *State v. Jackson*, 9 Mont. 508, 24 Pac. 213; *Bernstein v. Myers*, 99 Ga. 90, 24 S. E. 854; *Williams v. State*, 33 Tex. Cr. Rep. 128, 47 Am. St. Rep. 21, 25 S. W. 629, 28 S. W. 958; *Mergentheim v. State*, 107 Ind. 567, 8 N. E. 568.

¹⁴⁶ See post, §§ 406-411, 684 et seq.

¹⁴⁷ See *Thrall v. Smiley*, 9 Cal. 529; *State v. Jackson*, 9 Mont. 267, 24 Pac. 213.

new trial was presented where one not a juror retired with the jury, participated in their deliberations and in the preparation of their verdict;¹⁴⁸ also where, the verdict having been found by nine jurors, one of them was shown to have stated to outsiders, in substance, that some of the jury were ready to go over whenever a sufficient number could be obtained to find a verdict.¹⁴⁹

IV. DRINKING INTOXICATING LIQUORS.

§ 175. The point of disqualification from drink difficult to designate, except under the Iowa rule.

In nearly all the states the mere fact that a juror has partaken of intoxicating liquor prior to, or even after final retirements, aside from its effect, is treated as of small consequence. Nor is it usually important that prior to final submission, and when not actually engaged in the trial, he was slightly under its influence, in so far as it relates to the question of a new trial. In literal sense, the drinking of a stimulant and its effect are inseparable ideas. But it is generally understood, and recognized by the courts that there is a point when moderate stimulation ends and intoxication begins however difficult it may be to locate, or agree upon it; or in apt words to designate it. And there is practically no dissent from the proposition that if the reasoning and discriminating faculties of the juror are, seriously impaired, or his perceptions clouded, by the use of

¹⁴⁸ *Starling v. Thorne*, 87 Ga. 513, 13 S. E. 552. To same effect, *Cooney v. State*, 61 Neb. 342, 85 N. W. 281, where a bailiff who had been a witness for the prosecution, had charge of the jury, and remained with them several hours while they were deliberating on the verdict. But the mere fact that the bailiff in charge of a jury slept one night in the room where they were kept, was held not to amount to misconduct of the jury, entitling the defendant to a new trial, it being also shown that nothing was said between them or heard by the bailiff, concerning the case: *State v. Pepo*, 23 Mont. 473, 59 Pac. 721.

¹⁴⁹ *Albin Co. v. Demorest Mfg. Co.*, 22 Ky. Law Rep. 245, 56 S. W. 982. But it was held not a prejudicial disobedience of court's order not to talk about the case for a juror to state, at the close of the charge of the court that there is a misunderstanding among the jury as to the testimony of a witness, and ask to have stated what his testimony was: *People v. West*, 73 Cal. 345, 14 Pac. 848.

liquor, he is unfit to serve on a jury and his retention there vitiates the verdict.

There is one notable exception among the states of the Union to the foregoing propositions, and that is found in the decisions of the state of Iowa. The courts of one or two other states closely approximate those of that state. The "Iowa rule" warrants a new trial for any indulgence whatever by jurors, after retirement to deliberate upon a verdict, except, in moderate quantity, for medicinal purposes. This rule was first promulgated in *State v. Baldy*, reviewed and reaffirmed in *Ryan v. Harrow*, and has been ever since undeviatingly adhered to.¹⁵⁰ Although there are various degrees of divergence between the doctrine of the Iowa court and those maintained in other states, this must be conceded in favor of the former—that it is the simplest, easiest of comprehension and most subservient to the ends of justice. Moreover, it is feasible. There is probably not a county in any state in which a jury of twelve fair-minded men cannot be obtained who are able and willing to remain totally abstinent while deliberating on a verdict, or even during a trial. If there be such county or parish, that fact alone ought to necessitate a change of venue, unless the parties prefer to waive the disqualifying privilege. Next to submitting a cause to a hostile jury, nothing can be more perilous than to submit it to a jury composed in whole or in part of inebriates. But the moderate, or, as it is termed, the "liberal view" prevails in every other state except Minnesota, where the rule appears to be that even a slight indulgence during deliberation raises a presumption of prejudice, as in Iowa; but the Minnesota court qualifies the Iowa rule by permitting this presumption to be rebutted.¹⁵¹ The generally prevailing,

¹⁵⁰ *State v. Baldy*, 17 Iowa, 39; *Ryan v. Harrow*, 27 Iowa, 494, 1 Am. Rep. 302; *Berry v. Berry*, 31 Iowa, 415; *Fairchild v. Snyder*, 43 Iowa, 23; *State v. Morphy*, 33 Iowa, 270, 11 Am. Rep. 122; *O'Neill v. Railroad Co.*, 45 Iowa, 546; *Hopkins v. Knapp & Spaulding Co.*, 92 Iowa, 212, 60 N. W. 620. The reasoning in support of the rule in Iowa was advanced in *Ryan v. Harrow*, *supra*, with great ability by Mr. Justice Beck.

¹⁵¹ *State v. Madigan*, 57 Minn. 425, 59 N. W. 490. See, also, *State v. Salverson* (Minn.), 91 N. W. 1. And in Indiana a rule, approximating in its stringency that of Iowa, and similar to that in Minnesota, is adhered to: See *Brown v. State*, 137 Ind. 240, 45 Am. St. Rep. 180, 36 N. E. 1108.

or liberal view, was expounded by the court in *People v. Leary*,¹⁵² in which a prior decision was practically overruled. The exposition, though generally correct, contains some language which is inconsistent with the principal conclusion reached. The court, after stating the facts and distinguishing and criticizing prior decisions, said: "Whatever may be the rule elsewhere, it is now well settled in this state that the mere fact that a member or members of the jury have been guilty of using strong drink during the trial is not of itself sufficient ground for a new trial, where the evidence is such as to rebut the presumption of injury flowing therefrom to the defendant. . . . The act of carrying liquor to the juryroom clandestinely is undoubtedly a very reprehensible dereliction of duty on the part of a juror, if done willfully or wantonly, and, upon coming to the knowledge of the trial court, should be severely punished and cause the verdict to be jealously scrutinized. But that it should necessarily vitiate the verdict we cannot concede. It might well happen that investigation in a given instance would disclose that the liquor had been procured innocently, or under a supposed or actual necessity, with no intent to drink it for the mere love of it. It is a matter of common knowledge that many men require daily a certain quantity of alcoholic stimulant to maintain their physical, if not mental, equilibrium—some by reason of physical ailment, others because of long years of habit—and to be deprived of it is to be unfitted for their usual function to perhaps as great a degree as another might through overindulgence. Such a man upon a jury might, if locked up for days, feel, without any thought of impropriety, that it was necessary and justifiable for him to take a small quantity of liquor to his juryroom. Such an instance, in no way affecting the juror's capacity, should not necessarily set aside a verdict free from all other legal exceptions. After all, the act, if wrongfully done, is but an act of misconduct differing only in degree from any other, and the pertinent question is whether it has resulted in injury to the defendant. In this instance, that question was involved in the ruling of the lower court denying the motion for a new trial, and we cannot, upon the facts, say that it was wrong. If every relaxation

¹⁵² 105 Cal. 486, 493, 39 Pac. 24, criticizing and practically overruling *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719.

from the strict line of duty on the part of jurors, irrespective of its effect upon their verdict, were to furnish ground for retrial, very few verdicts could be sustained, and the administration of criminal justice would be rendered difficult indeed." The opening paragraph above quoted is somewhat misleading. The words "where the evidence is such as to rebut the presumption of injury flowing therefrom to the defendant," in connection with the context, make that entire paragraph speak the doctrine of the case which the court intends to overrule. The mere drinking of liquor "during the trial" raises no presumption whatever. The cases cited and quoted by the learned justice who wrote the opinion support this criticism, particularly *People v. Deegan* and *People v. Sansome*. As previously stated, "the mere fact that a member or members of the jury have been guilty of using strong drink during the trial" is not only, "not of itself sufficient ground for a new trial" in any case, but it is not in any case a matter of any serious importance, according to the "liberal view" which has been firmly established in California. It is the effect on the juror to which the courts direct their attention. In this species of misconduct, differing in this respect from all others, the effect of the act of drinking is the all-important fact, and it is—herein again differing from all others—susceptible of proof. And if that effect, as proven, amounts to a disqualification of the juror for properly performing his duties at a stage or point in the trial when he is called upon to exercise his mental faculties, nothing more need be shown; nothing more can be shown, and a new trial should be granted unless the right to complain be waived. Evidence of the drinking, and of the kind and quantity, is, of course, admissible, but no presumption of prejudice to a party arises, requiring to be overcome by other evidence, until some deleterious effect of the drinking is shown. The evidence as to quantity, unless it be enormous, is of comparatively little value. The courts have frequently given expression to knowledge, resulting from common observation, that one man may be seriously affected by a small quantity, while another may maintain his faculties unimpaired after having consumed many times the same quantity. If, when duties as such are required of him to be performed, the juror be in any of the stages of drunkenness, as the term is popularly and also

§ 177. Duty of party to object.

It seems that it is the duty of the party to raise the point of misconduct, consisting of the drunkenness of a juror, coming to his notice during the trial;¹⁵⁶ but it is difficult to see what the court could do except to discharge the jury, if the juror has already participated in the proceedings in the same condition. That would necessitate a mistrial, but would not remedy the evil already done. In case the juror had not, at the time of such discovery, participated, while in that condition, an adjournment could be taken, pending his recovery from it.

V. REACHING VERDICT BY UNFAIR MEANS.

§ 178. Reaching verdict by resort to chance.

Subdivision 4 of section 1181 of the Penal Code reads thus: "When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors." It will be observed that in the Code of Civil Procedure the resort to unfair means (only one form of such resort being specified) is in the subdivision with misconduct of the jury generally, as a species of misconduct, while in the

on theory probably that, but for intoxication, verdict might have been reconsidered: *State v. Ned*, 105 La. Ann. 696, 30 South. 126, one juror in drunken condition through the trial.

New trial refused.—*Territory v. Hart*, 7 Mont. 489, 510, 17 Pac. 718; *Territory v. Burgess*, 8 Mont. 57, 19 Pac. 558, moderate drinking, no prejudicial effect; *Gordon v. Louisville St. etc. Ry. Co.*, 16 Ky. Law Rep. 713, 29 S. W. 321, not sufficient effect on juror shown; *State v. Branssard*, 41 La. Ann. 81, 17 Am. St. Rep. 396, 5 South. 647; *State v. Demoreste*, 41 La. Ann. 413, 6 South. 654, cases of moderate drinking; *State v. Reed*, 3 Idaho, 754, 35 Pac. 706, case of moderate indulgence, no proper showing of evil effect; *Commonwealth v. Cleary*, 148 Pa. 26, 23 Atl. 1110; *Commonwealth v. Salyards (Pa. O. & T.)*, 13 Pa. Co. Ct. Rep. 470, moderate drinking at meals; *Rider v. State*, 26 Tex. App. 688, 9 S. W. 688, no prejudicial effect shown; *King v. State*, 91 Tenn. 617, 20 S. W. 160; moderate drinking after final retirement; *Sanitary Dist. v. Cullerton*, 147 Ill. 385, 35 N. E. 723, drinking without intoxication; *State v. Harrigan*, 9 Houst. (Del.) 369, same; *McLendon v. State*, 66 Ark. 646, 51 S. W. 1062, small quantities liquor twice per day; *Merriman's Appeal*, 108 Mich. 454, 66 N. W. 372, drinking beer, short of intoxication; *State v. Taylor*, 134 Mo. 109, 35 N. W. 92; same.

¹⁵⁶ *Ipswitch v. Fernandez*, 84 Cal. 639, 24 Pac. 298.

s separately specified. Such difference of substance, however, affect the true character of the acts, species of misconduct justifying consideration as such, whether found in a civil or in a criminal case. In a chance verdict is the elimination of the influence, of the jurors. It is obvious that the high such verdicts are viewed by the courts is

Such a result is in no sense the result of a chance. Such results could be tolerated, juries would not play a game could be played as well without as with chance. Has this come to be understood by juries, that chance verdicts are to be found, except in the form of "chance" verdicts, presently to be noticed. The game may be played in as many ways as there are games. In *Donner v. Palmer*¹⁵⁷ a piece of chance, the consent to, or continued dissent from, a verdict by two of the jurors, depending upon the jurors guessed heads or tails correctly. In *Donner v. Palmer*, the trial court denied a motion for a new trial on such misconduct, and one was ordered by the

Dividing aggregate individual estimates by number of jurors and returning quotient as verdict.

A verdict was regarded and decided in an early case in the same light as a gambling verdict, and was so regarded.¹⁵⁸ Nevertheless, in *Turner v. Tuolumne Co.*¹⁵⁹ gain in *Boyce v. California Stage Co.*,¹⁶⁰ it was held that verdicts, though irregular and vicious, were not void. These decisions were in turn overruled by the Supreme Court in *Turner v. Tuolumne Co.* and the law established in California in consonance with the earlier case. The question came squarely before

See, also, *Levy v. Brannan*, 39 Cal. 485, 489; *Turner v. Tuolumne Co.*, 160 Mass. 397, 39 Am. St. Rep. 500, 36 N. E. 5, note, 35 Am. Dec. 259, note; 63 Am. Dec. 80, *Union Pac. R. Co.*, 22 Utah, 338, 62 Pac. 317; *Lewiston (Idaho)*, 55 Pac. 545. *Erryman*, 5 Cal. 45, 63 Am. Dec. 78.

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), 474.

the court in *Dixon v. Pluns*, ¹⁶¹ Garoutte, J., delivering the opinion (the chief justice and four associate justices concurring), after referring to the statute and reviewing prior decisions, said: " 'Chance' may be defined to be hazard, risk, or the result or issue of uncertain and unknown conditions or forces, and the facts here developed bring the case clearly within such definition. In the present case each juror agreed that a definite amount should be the verdict of the jury, at a time when he had no knowledge whatever as to what the amount should be, for it had not yet been computed. No person even knew the figures upon which the computation would be made. If the estimate of each juror is before the eyes of the other when the agreement is made, then no chance element will be found in the result, for it would be mere matter of mathematical computation; but without a knowledge of these estimates, the character of the verdict will be as entirely unknown to the jurors as though the whole matter were decided by the casting of a die, or the tossing of a coin. In the casting of a die, or the tossing of a coin, justice has an equal chance with injustice, but under the system here considered, one unscrupulous and cunning juror always has the power to defeat justice by increasing or decreasing the amount of the verdict in proportion as he places his estimate at an unconscionably high or low figure. In the casting of a die the chance of winning or losing is dependent upon the face of the die that presents itself after the cast. In arriving at a verdict in the manner here practiced, the chance of the respective parties, plaintiff and defendant, to secure the verdict is entirely dependent upon the sum total of the estimates made by the various jurors, and that sum total is uncertain and unknown to the gamester. We are clearly of the opinion that this verdict was obtained by a resort to chance, and Turner

¹⁶¹ 98 Cal. 384. See, also, *Weinburg v. Soms* (Cal., June 9, 1893), 33 Pac. 341; *McDonnell v. Stage Co.*, 120 Cal. 479, 65 Am. St. Rep. 184, 52 Pac. 725; *Williams v. State*, 66 Ark. 264, 50 S. W. 517. Prior to *Dixon v. Pluns*, the doctrine of *Turner v. Tuolumne Co. W. Co.* and *Boyce v. California Stage Co.* had been repudiated in other states. *Pawnee Ditch etc. Co. v. Adams*, 1 Colo. App. 250, 28 Pac. 662; *Flood v. McClure*, 3 Idaho, 587, 32 Pac. 254, both cited and followed in *Dixon v. Pluns*; *White v. State*, 37 Tex. Cr. App. 651, 40 S. W. 789; *Good v. State* (Tex. Cr. App.), 67 S. W. 102.

court of Montana, in an able opinion by De Witt, J., filed about the time of the decision in *Dixon v. Pluns*, also repudiated the early California cases above mentioned and came to the same conclusion as was reached in other recent cases. A different view was reached by the supreme court of South Dakota, prior to either of the above decisions,¹⁶⁴ holding a quotient verdict not a chance verdict. Since a quotient verdict is "vicious and irregular," the only importance attaching to the question whether it is a chance verdict relates to the admissibility of the affidavits of jurors to prove the misconduct under statutes making an exception in cases of chance verdicts.

§ 180. Inattention and indifference to oath.

The species of misconduct remaining to be considered is of a negative character. If a juror, after being sworn and hearing a case refuses to exercise his mental faculties at all, and stands wholly indifferent to results, that being clearly shown has been held to entitle a party to a new trial. It stands upon the same footing as if he submitted the issues to a determination by lot or chance. Accordingly, it was held that it was ground for a new trial, for a juror after hearing the case and retiring, but before going to the juryroom, to remark to a bystander: "I'll wind it up in a short while. One way or the other will suit me."¹⁶⁵ It is not, however, sufficient to show that jurors agreed to a compromise.¹⁶⁶ Probably if a juror, or jurors, should agree, before taking a ballot, that they would, after it was taken, stand with the majority, a verdict so reached would be set aside. Where, however, a juror in a capital case stated in the jury-

¹⁶⁴ *Ulrich v. Dakota Loom etc. Co.*, 2 S. Dak. 285, 49 S. W. 1054.

¹⁶⁵ *State v. White*, 48 La. Ann. 1444, 21 South. 26. See, also, *State v. Walls*, 52 La. Ann. 1002, 27 South. 537. In several cases it has been held to be no ground for a new trial that a juror slept during the trial: See *United States v. Boyden*, 1 Low. 266, Fed. Cas. No. 14,632; *McClary v. State*, 75 Ind. 260; *People v. Morrissey*, Sheld. 295; *Commonwealth v. Jongrass*, 181 Pa. St. 172, 37 Atl. 207. If, however, in an aggravated case of the kind, objection were made to the court in due time, some relief would be obtainable, either a discharge of the jury, a new trial, or a continuance until the juror, or jurors, could finish the nap.

¹⁶⁶ *Godwin v. Albany Fertilizer Co.*, 99 Ga. 180, 25 S. E. 181.

CHAPTER 10.

ACCIDENT OR SURPRISE.

- § 182. Statutory provisions.
- § 183. Meaning of terms as used in the statute.
- § 184. Distinction between accident or surprise and excusable neglect.
- § 185. Analogy, interdependence and concurrence between this and other grounds of the motion.
- § 186. Applications on this ground looked upon with suspicion.
- § 187. Of trial courts' discretion herein.
- § 188. Surprise not usually predicable upon ruling or decision of court—Exceptions.
- § 189. No surprise when investigation of matter on trial was reasonably to be expected.
- § 190. Not granted except upon showing of diligence—Doctrine of waiver.
- § 191. Same—Must ask for delay or continuance at proper time.
- § 192. Where application for continuance excused.
- § 193. Forgetfulness and oversight do not constitute surprise.
- § 194. New trials not granted unless probability of a different result be shown.
- § 195. Surprise consisting in act of court.
- § 196. Surprise consisting in violation of agreements and misleading information by opposite party or counsel.
- § 197. Misconduct and neglect of party's own counsel.
- § 198. Surprise consisting of trial upon wrong theory by mistake of both sides.
- § 199. Accident and surprise resulting in inability to attend trial.
- § 200. Unexpected failure of witnesses to attend.
- § 201. Surprise consisting in unexpected testimony of party's own witness.
- § 202. Surprise consisting in unexpected evidence from opposite party.
- § 203. Essentials of affidavits on the motion.

§ 182. Statutory provisions.

The above ground for new trial has been specified in the statute in the same words since 1851. There is no similar or corres-

ponding provision in section 1181 of the Penal Code, governing new trials. In case of accident or surprise to the defendant in a criminal prosecution, he should, if the means for overcoming the surprise be then known to him, apply for a continuance. If not known, he may usually obtain relief on the ground of newly discovered evidence.

§ 183. Meaning of terms as used in the statute.

Owing to some divergence in previous views as to the meaning of the words "accident or surprise" in the statute, and the necessity of differing from respectable authority herein, it is proper to critically investigate their meaning. In *McGuire v. Drew*,¹ the following was offered by way of definition or explanation of these words as used in the code: "The terms 'accident' and 'surprise,' though not strictly synonymous, have, as used in legal practice, substantially the same meaning, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any default or negligence of his own which ordinary prudence could not have guarded against." This view is erroneous, and is but slightly supported by the authorities cited. The same court has in numerous decisions given practical, though not literal, expression to a contrary view. To entitle a party to a new trial under this subdivision he must show not only surprise, but accident,² and he must show not only accident, but surprise.³ They cannot, therefore, have, "as used in legal practice, substantially the same meaning." The courts have given the words a practical construction as if they read "accident and surprise," the concurrence of both being essential to the granting of a new trial under this subdivision, the one as necessary as the other. "Accident," when used in common parlance means anything occurring unexpectedly, or without known or assignable cause; a contingency; as the accidents of fortune.⁴ The unexpected occurring together of any two or more events, out of their usual

¹ 83 Cal. 225, 229, 23 Pac. 312.

² For distinction between this and other grounds of relief, see §§ 184, 185.

³ For essentials of affidavits under this head, see post, § 203.

⁴ Standard Dictionary.

course, or order. Surprise has a conventional, as well as a true meaning; but its true meaning is not identical with the meaning of accident. One of its popularly accepted meanings gives it the status of a cause, as where it is said that a fortress was taken by surprise. But in such case surprise simply attends the act of capture; it is not the cause. The unexpected act of demanding surrender of the fortress would create surprise. The concurrence of the unexpected demand and unpreparedness for defense would be an accident to the garrison, resulting in surprise in the true sense of the term.

Now, while the legal meaning of these terms is somewhat narrower than their literal meaning, neither of them is used in the law in a sense which is materially inconsistent with the literal or true meaning. For instance, a correct ruling of the court concurring with an offer of incompetent evidence may constitute both actual accident and surprise to a party, or even to his attorney, if the latter happened to be ignorant of the law of evidence, but it would not constitute legal accident or legal surprise. But if the court, having correctly ruled in a party's favor, should subsequently and erroneously reverse its ruling and reject the evidence, that would constitute both actual and legal surprise. Whether the party could show his ability to meet and overcome the result of it on retrial would be another and different question. Accident is an original head of equitable jurisdiction. Surprise is the result of accident. It is in legal sense the situation in which a party is placed without any default of his own, which will be injurious to his interests. It is only when such is the result of accident that it becomes necessary or proper for courts of equity to afford relief to the party so surprised.⁵ Accident and surprise were not a common-law ground for new trial of actions at law. The equitable remedy of the same name has been borrowed and incorporated by statute among the grounds cognizable by courts which administered legal remedies exclusively.

Mere accident, mistake, or misfortune, unconnected with the preparation for trial, or proceedings in court, where no fault is imputable to the adverse party, nor any irregularity is shown in the conduct of the court, is not generally held to entitle a

⁵ 1 Story's Equity Jurisprudence, § 120, note.

party to a new trial under this head.⁶ The authorities, however, furnish several instances where relief has been granted from the results of such causes, in the exercise by trial courts of liberal discretionary powers, and of their orders being upheld on appeal.⁷ A party represented by an attorney is not without remedy in such cases. If the facts constituting the accident or excusable mistake be set up by his attorney in an affidavit for continuance and the court refuse to postpone the trial he may generally except and appeal or move for a new trial on the ground of abuse of discretion.⁸ If they be unknown to him at the time or if he be not present at the trial, a proceeding under the appropriate statute to set aside and vacate the order

⁶ See *Cox v. Lewiston*, 6 N. H. 167, 20 Atl. 246.

⁷ See *Owens v. Paxton*, 106 N. C. 480, 11 S. E. 375, loss of pleadings and judge's notes rendering settlement of case for appeal impossible; *Fire Assn. v. McNerney* (Tex. Civ. App.), 54 S. W. 1053, same; *McCotter v. New Shoreham* (Town Council of), 21 R. I. 425, 44 Atl. 473, party prevented by accident from filing appeal bond; *Huntress etc. Lumber Co. v. Wyman*, 55 Minn. 262, 56 N. W. 896, death of party just prior to trial; *Chicago etc. Ry. Co. v. Genesee Cir. Judge*, 89 Mich. 549, 50 N. W. 879. In the last case, plaintiff's testimony was material, and before his cross-examination was completed he was taken seriously ill and his attorney supposing, on advice of the attending physicians that he would never be able to resume his examination, allowed his testimony to be stricken out, and proceeded with the trial. It was held that, a verdict having been returned for the defendant, plaintiff was entitled to a new trial upon his recovery. Strictly speaking, there was a lack of diligence in not asking for a postponement. Misunderstanding as to date of trial—impassable roads and change of train schedule, entitling party to new trial on ground of accident; *McCormick Harvesting Mach. Co. v. Marchant*, 11 Utah, 68, 39 Pac. 483. The Iowa statute covers cases of this description; and a party was held entitled to new trial on account of misunderstanding as to whether he had employed counsel in connection with sickness of counsel and of his family, constituting "unavoidable casualty and misfortune" within meaning of statute: *White v. Gray*, 92 Iowa, 525, 61 N. W. 173. When new trial sought on account of death of trial judge, held that a new trial should not be granted, unless, after due allowance for the superior advantages of the trial judge, it is still clear that the result was opposed to the weight of evidence: *Reynolds v. Reynolds*, 44 Minn. 132, 46 N. W. 236.

⁸ See *Beckham v. Morrison*, 14 Ky. Law Rep. 241, 20 S. W. 197.

or judgment so taken against him through inadvertence, excusable neglect, etc., will afford relief.⁹

§ 184. Distinction between accident or surprise and excusable neglect.

It is sometimes difficult to determine whether the facts show accident and surprise entitling the party to proceed for a new trial, or whether he should proceed under section 473 of the California Code of Civil Procedure (similar provision being found in statutes of other states) for relief "from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." There is no such ground for granting a new trial as mistake or inadvertence, as distinguished from accident or surprise in California.¹⁰ It is otherwise in New York,¹¹ and Iowa,¹² and perhaps in one or two other states.¹³

In *Fincher v. Malcombson*¹⁴ the court said: "It is plain that there is nothing in the nature of accident or surprise shown by the affidavits. The trouble seems to be that his [the movant's] attorney withdrew his cross-complaint, failed to ask for a continuance, or to be present at the trial. But all this was done deliberately after consultation, possibly with bad judgment, but certainly there is found here no element of surprise or accident. According to the affidavits of his attorneys, which are corroborated by other affidavits, it was also done after consultation with defendant and with his consent. He denies this, and proceeds now as though his attorneys were the adverse party, and not his representatives. He is bound by the action of his counsel, and cannot avoid responsibility in this way. What they knew he knew; what they did as his attorneys he did. There is no charge that his attorneys were incompetent, un-

⁹ See Cal. Code Civ. Proc., § 473, and similar provisions in other states.

¹⁰ *Fincher v. Malcombson*, 96 Cal. 38, 30 Pac. 835.

¹¹ See *Huson v. Egan*, 25 N. Y. St. Rep. 906, 6 N. Y. Supp. 661.

¹² See *White v. Gray*, 92 Iowa, 525, 61 N. W. 173.

¹³ See *Chesapeake etc. Ry. Co. v. Hickey*, 15 Ky. Law Rep. 112, 22 S. W. 441.

¹⁴ 96 Cal. 38, 40, 30 Pac. 335.

And the court cited section 473. In *Robertson v. Williams*¹⁹ the losing party did not appear at the trial, either in person or by counsel, and relief was sought exclusively by motion for new trial, on the ground of accident and surprise. An order denying a new trial was reversed. The opinion reads in part as follows: "The appeal is from the judgment, and the order denying a new trial. But the sole point made is that the trial court ought to have granted a new trial on the ground of surprise, and to this we agree. There were no opposing affidavits. It therefore stands virtually admitted that the absence of the defendant and his attorney was caused by their reliance upon the promise of the plaintiff's attorney to notify the defendant's attorney before taking up the case, and the failure to comply with such promise. It is true that this promise was verbal, and therefore that it could not be enforced as such. But it seems to us that reliance upon the word of a reputable attorney is excusable neglect, for which relief may be given so far as to set aside the advantage taken in violation of the promise. If the promise had been denied, then we think that in view of the practical difficulty of investigations of that character it would have been proper to refuse relief. But the fact being virtually admitted, we think that the motion should have been granted." It will be noted that the court uses the term "surprise" in one part and "excusable neglect" in another to signify the same thing. But in *McGuire v. Drew*,²⁰ where one of the defendants was absent from, and unrepresented at the trial, and sought relief in both forms, the court distinguished the two modes of relief, but went fully into the merits of the motion for a new trial, as if such motion should be entertained in such a case. The court decided, and expressly declared, however, that excusable neglect is not one of the grounds of a motion for a new trial under the section governing new trials, whereas, under section 473, it is one of the grounds, in addition to the ground of surprise, upon which a judgment may be vacated. Consequently, the latter is broader, and is sometimes the more efficacious, of the two forms of procedure. Both may be resorted to, there being no conflict or inconsistency.

¹⁹ 81 Cal. 268, 22 Pac. 665. This case seems never to have been cited or used as authority.

²⁰ 83 Cal. 225, 23 Pac. 312.

prise as a basis fails for want of knowledge of the existence of evidence to meet the evidence which caused the surprise, and the party surprised, after the trial, newly discovers such evidence, the other requisites of a good and sufficient showing being made, will be entitled to a new trial on the ground of newly discovered evidence. Under these circumstances he is not chargeable with negligence in failing to apply for a postponement.²³ In another case plaintiff, in an action for injuries, testified on cross-examination that, if he made certain statements sworn to by his physicians, he was out of his right mind at the time. There was nothing in his petition as to his being out of his mind, and defendant, thus surprised, was not prepared to disprove it. It was held that, such statements being material, defendant, on discovering proof of plaintiff's sanity at the time, was entitled to a new trial, on the ground of newly discovered evidence.²⁴

It has been held in other cases that, under these circumstances, the party might move on the ground of surprise.²⁵ The safer course would undoubtedly be to specify and make a proper showing under both heads.

It will be observed, as the discussion proceeds, and from what has preceded, that in most cases of accident and surprise an

²³ *Felver v. Judd*, 81 Ill. App. 529.

²⁴ *Missouri Pac. Ry. Co. v. Walker* (Tex.), 7 S. W. 701.

²⁵ *Rodriguez v. Comstock*, 24 Cal. 85; *Mutual L. Ins. Co. v. Parrish*, 63 Ark. 612, 52 S. W. 438. In *Wilson v. Brandon*, 8 Ga. 136. After verdict for the plaintiff, defendant moved for a new trial because his witness, by mistake, failed to prove a fact to make out his defense (the witness having previously assured the defendant that he could and would do so), whereby the defendant was prevented from procuring other testimony to prove the same fact. Held, that such mistake operated as a surprise on the defendant, and that he was entitled to a new trial. In *Levy v. Brown*, 11 Ark. 16, in a trial on a note, a witness for defendants swore that it was usurious. On appeal, the same witness testified to a different state of facts, and a verdict was rendered for the plaintiff. Held, that the defendant was entitled to a new trial on the ground of surprise. In *McFarland v. Clark*, 9 Dana, 134, upon the trial a witness testified as to the execution of a certain receipt directly contrary to the version she had given prior to the trial, and a new trial was awarded.

188. Surprise not usually predicable of court—Exceptions.

It would be difficult to imagine a court afford a different remedy for an error of a trial court from that afforded upon error of the trial court. In the case of erroneous rulings the general rule is that the court has no power to set aside its ruling as to the law, or advice of counsel, or contrary to the rulings of the court, or for which a new trial may be granted. *See* *Roach*,³⁰ where evidence offered under clear statutory authority was excluded, and the party alleged that he was advised by counsel that the evidence offered was sufficient proof, not being prepared with other evidence. The supreme court, in affirming the order of the trial court, remarked that, "the discovery which the party seems to have been one of law reference." And the mistake of counsel of a witness was held no ground for setting aside the verdict on surprise.³¹ But it would be a relief on motion based upon accidental or prejudicial changes in its rulings by the court, in a way as to create a real surprise, that the court is not prepared to meet. Thus when a trial was taken unawares, and, without notice, was placed in a situation greatly injurious to the party by the unexpected admission of evidence upon the trial, or of an order of court made previous to the trial, he was not prepared to meet the surprise was presented which might

³⁰ *Santa Cruz R. P. Co. v. Bowie*, 104 Cal. 160; *Lawrence v. Fulton*, 19 Cal. 683; 107 Cal. 70 Am. Dec. 746; *Perkins v. Braine*, 32 N. Y. Supp. 230.

³¹ 76 Cal. 106, 18 Pac. 137. See, also, *Roach*, 106 Cal. 160; *Santa Cruz R. P. Co. v. Bowie*, 104 Cal. 160. The court remarked: "Erroneous view of the law, contrary to the ruling of the court, for which a new trial will be granted." *Packer v. Heaton*, 9 Cal. 568.

for what may be reasonably anticipated and consequent surprise do not present the condition contemplated by statutes giving the remedy only where ordinary prudence could not have guarded against it.

Where the pleadings indicate with reasonable certainty the line of proof which may be expected to be pursued by either party, the other and losing party cannot predicate surprise solely upon the introduction by his opponent of evidence different from what he expected would be offered.³⁴ Where a plaintiff has simply proved the allegations of his pleadings, the defendant cannot complain of surprise.³⁵ Accordingly, it was held that a defendant could not claim surprise in a libel suit as resulting from evidence of the falsity of the article claimed to be libelous, the truth of it being set up in his answer as a defense.³⁶ And a defendant in replevin ought not to be surprised if plaintiff offers proof of a special property in the subject of litigation under a general allegation of ownership, where the reply sets forth the facts as to the special owner-

³⁴ See *Gulf etc. Ry. Co. v. Shearer*, 1 Tex. Civ. App. 343, 21 S. W. 133; *Salida etc. Assn. v. Davis* (Colo.), 68 Pac. 1046. See *Armstrong v. Davis*, 41 Cal. 494, applying the principle where defendant had set up a counterclaim.

In the last case cited the court said: "The note on its face purports to have been made for value received; and the defendant, in his answer, sets out a copy of the note and relies upon it as a valid counterclaim. With this answer before them, it is difficult to understand how the plaintiffs could have been surprised when the defendant testified that the note was given for a valuable consideration, and was not made for his accommodation. After setting it up in his answer as a counterclaim, and after the plaintiffs had distinctly taken issue upon the averment that the note was made for a valuable consideration, they could not well have been surprised that the defendant attempted to make good by proof a fact distinctly put in issue in the pleadings. The note itself was *prima facie* evidence that it was made for a valuable consideration, and the onus was on the plaintiffs to rebut this presumption. Under all the facts, the plaintiffs have shown no such surprise as entitled them to a new trial on that ground." To same effect, *Francisco v. Benepe*, 6 Mont. 243, 11 Pac. 637.

³⁵ *Francisco v. Benepe*, 6 Mont. 243, 11 Pac. 637.

³⁶ *Hartman v. Morning Journal Assn.* (Common Pleas), 19 N. Y. Supp. 401.

be seen that most of them involve other considerations than the mere feature of unexpectedness, and thus render the rule just stated inapplicable to them.

§ 190. Not granted except upon showing of diligence—Doctrine of waiver.

A party cannot claim as a basis for a new trial that he was misled by accident or the misleading conduct of the opposite party, when his own lack of vigilance has contributed to the unexpected result of the trial.⁴² And it may be stated, as a general rule, to which there are few, if any, clear exceptions, that the negligence of an attorney herein is the negligence of the party he represents.⁴³

The rule exacting diligence is supported by two reasons: 1. The disinclination of courts to impose upon the successful party the expense and hazard of a new trial, which would have been avoided but for the other party's neglect; and, 2. On the presumption of waiver.⁴⁴

⁴² The above proposition is sustained by a vast number of authorities which it would be useless to cite. See, *Brooks v. Lyon*, 3 Cal. 113, where it appeared that by the exercise of the slightest degree of prudence on the part of the appellant or his attorney the surprise would have been guarded against: *Klaekenbaum v. Pierson*, 22 Cal. 463; *Walker v. Gray* (Ariz.), 57 Pac. 614; *Solomon v. Norton* (Ariz.), 11 Pac. 108; *Friedman v. Manley*, 21 Wash. 43, 56 Pac. 832; *Albert v. Seiler*, 31 Mo. App. 247. For a case of sheer neglect and consequent loss of right to assert surprise, see *Pincus v. Puget Sound Brewing Co.*, 18 Wash. 108, 50 Pac. 930, where the party waited until the case was about to be tried before calling upon its proper custodian for a record, and then discovered that it was missing and could not be found.

⁴³ See *Staunton Coal Co. v. Menk*, 197 Ill. 369, 64 N. E. 278.

⁴⁴ Doctrine of waiver asserted in *State v. Gardner*, 33 Or. 150, 54 Pac. 809; *Reeder v. Traders' Nat. Bank*, 28 Wash. 139, 68 Pac. 461; *Derber Watch Case Manufg. Co. v. Lapp*, 35 Ill. App. 372. In *State v. Gardner*, supra, the court said: "The affidavits in support of the motion for a new trial show that Mabel Hitchman testified at defendant's preliminary examination, and also before the grand jury, that the crime was committed May 20, 1897, and the indictment so alleged the fact. At the trial, however, she testified that the overt act occurred a month earlier, and this change is the surprise of which the defendant complains, and which his counsel insist affords

press the examination so as to show that the privilege is not properly claimed.⁴⁶ Nor can a party claim surprise by reason of his reliance upon the weakness of the case for the opposite party, as where a defendant took the chances of the inability of the plaintiffs to prove their case and remained away from the trial.⁴⁷

There is also a failure of diligence, warranting a denial of the relief, when a litigant fails to be prepared with the proper evidence because of his reliance on proofs expected to be made by the opposite party, and he is disappointed. Thus, where depositions had been taken, the party upon whose application they were taken not being bound to offer them in evidence at the trial, and being at liberty to resort to other evidence, his failure to use the depositions was held not a ground of surprise, for which a new trial should be granted.⁴⁸

⁴⁶ *Nicholson v. Randall Banking Co.*, 130 Cal. 533, 62 Pac. 930.

⁴⁷ *Reynolds v. Manville*, 5 Colo. App. 486, 39 Pac. 350.

⁴⁸ *Heath v. Scott*, 65 Cal. 548, 4 Pac. 567. For another case of like reliance, disappointment, and failure to obtain relief on motion for new trial, see, *Eigenbrun v. Smith*, 98 N. C. 207, 4 S. E. 122. In *Heath v. Scott*, supra, the court said: "But plaintiffs claim to have been surprised by the attack upon the character of their witness, because, they say, that after the attorneys of defendant had notified and stipulated with them for taking depositions and counter-depositions of witnesses in San Luis Obispo County, to be read as evidence upon the subject of inquiry as to the character of Morse, they went to trial without the depositions, and resorted to other testimony for the purpose of impeachment. Going to trial in a case without depositions which have been taken in it, constitutes no legal surprise; for if the depositions have not been transmitted to the court before trial, either party may, if he wants to use them, move for a continuance until they come to hand; or if they have been transmitted, and the party by whom they were taken does not offer them in evidence, the adverse party may offer them, or any part of them, in evidence: Code Civ. Proc., sec. 2034. A party taking depositions is not bound to offer them in evidence. He may resort to other testimony, and if he does not take that course, and the adverse party is surprised by it, the latter must then and there apply for any relief to which he may be entitled, under the conditions in which he finds himself. If he does not apply, he will not be entitled to claim the surprise as a ground for setting aside a verdict against him. It is well settled that, if a party claiming to be surprised by the introduction of testimony,

§ 191. Same—Must ask for delay or continuance at proper time.

Barring exceptional circumstances noted in the next section, the party surprised must, at the time of the surprise, if enabled by time for preparation to meet the situation so presented, ask for such time. The courts, as a rule, are extremely liberal in granting continuances, and will and should, if necessary, grant relief at once from legal surprise, if within their power.⁵³ Nor should the party delay his application until further expense has been incurred, or, perhaps, the opposite party has altered his position. He should apply for relief from the surprise at the earliest practicable moment, and in such method as will produce the least vexation, expense, and delay.⁵⁴ If the relief required consist in a postponement or continuance, and the party neglect to apply therefor, his motion for a new trial, on the ground of accident and surprise should be denied on account of such neglect.⁵⁵

But cases frequently arise in which the foregoing rules as to waiver and neglect ought not to be strictly enforced. In *Rodriguez v. Comstock*,⁵⁶ it was considerably relaxed in favor of a party who was deceived by his own witness in respect to the facts to which he would testify, and who had failed to move for a continuance. But, as was said in *Delmas v. Martin*:⁵⁷ "In relaxing the rule, it should be done only where the

words, 59 Kan. 164, 52 Pac. 424, where misprint in statute caused the surprise. Held, that the attention of the court should have been called to it.

⁵³ See *Schellhouse v. Ball*, 29 Cal. 605.

⁵⁴ *Delmas v. Martin*, 39 Cal. 555; *Ferrer v. Home Mutual Ins. Co.*, 47 Cal. 416.

⁵⁵ *Schellhouse v. Ball*, 29 Cal. 609; *Turner v. Morrison*, 1 Cal. 21; *Doyle v. Sturgis*, 38 Cal. 456; *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416; *Dewey v. Frank*, 62 Cal. 343; *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910; *Romero v. Lopez* (N. Mex.), 21 Pac. 679; *Fox v. Territory*, 2 Wash. Ter. 297, 5 Pac. 803; *Bayonne Knife Co. v. Umbenbauer*, 107 Ala. 496, 54 Am. St. Rep. 114; 18 South. 175; *Davidson v. Wheeler*, 17 R. I. 433, 22 Atl. 1022; *Cunningham v. State*, 74 Tex. 511, 12 S. W. 217; *Flint & P. M. E. Co. v. Marine Ins. Co.* (C. C.), 71 Fed. 210.

⁵⁶ 24 Cal. 85.

⁵⁷ 39 Cal. 555, 558.

§ 193. Forgetfulness and oversight do not constitute surprise.

Failure to remember what is necessary in the conduct of a case is imputable as neglect. It would never do to concede the right to a new trial, as for accident and surprise, nor upon any other ground, upon his affidavit setting up his own forgetfulness, an allegation which could never be successfully controverted. There would be practically no end to applications for new trials, if that were permissible.⁶¹

§ 194. New trial not granted unless probability of a different result be shown.

Since applications for new trial on this ground are looked upon with disfavor, and since it is the policy of the law that matters once litigated shall not be reopened and retried except to prevent gross injustice, it is a universal condition to the granting of the motion on this ground that a strong probability of a different result upon a retrial be made to appear.⁶² And, if the new trial be sought on account of surprise, which prevented a defendant from appearing and making any defense, or a proper defense, he must, in his application, set out facts constituting a meritorious defense.⁶³ And, when the new trial is sought on the ground that a witness testified contrary to what the party calling him expected, it is not such accident and surprise as will warrant the court granting it, if such

fraud practiced on the jurisdiction, motion for new trial granted without strong showing of diligence: *Bostwick v. Bostwick*, 73 Tex. 192, 11 S. W. 178.

⁶¹ See *Rees v. Blackwell*, 6 Ind. App. 506, 33 N. E. 988; *Crowell v. Harvey*, 30 Neb. 570, 46 N. W. 709.

⁶² *O'Donnell v. Bennett*, 12 Mont. 242, 29 Pac. 1044; *McClusky v. Gerhauser*, 2 Nev. 47, 90 Am. Dec. 512; *Andrust v. Union Pac. Ry. Co.*, 30 Fed. 345; *Brinson v. Faircloth*, 82 Ga. 185, 7 S. E. 923. For like reason a new trial was held properly refused when urged on ground of death of judge before commissioner's report filed, it appearing that no exceptions had been reserved: *Richardson v. Schnyder County etc. Assn.*, 156 Mo. 407, 57 S. W. 117.

⁶³ *Brooks v. Douglass*, 32 Cal. 208, 212; *Patterson v. Ely*, 19 Cal. 35, 36; *Taylor v. California Stage Co.*, 6 Cal. 228; *Schellhouse v. Ball*, 29 Cal. 605; *Cook v. De la Guerra*, 24 Cal. 238; *McGuire v. Drew*, 83 Cal. 225, 230, 23 Pac. 312; *Auburn Cycle Co. v. Foote*, 69 Ill. App. 644; *Halliday v. Halliday*, 72 Tex. 581, 10 S. W. 690; *Campbell v. Butler*, 32 Mo. App. 646. In *Patterson v. Ely*, su-

decision may well be doubted. To so decide is to evade the point presented and decide the motion on a ground not relied upon and upon which the moving party has had no opportunity to be heard.

§ 195. Surprise consisting in act of court.

Prejudicial acts of the court are usually presented on the motion under the head of irregularity.⁶⁷ But, an act of the court may also constitute surprise within the legal meaning of that term. Thus, where defendant understood from a statement of the judge that the trial would not be taken up until the next week, and it was taken up and tried the same week before a special judge, in the absence of defendant and his counsel, without notice, it was held that defendant was entitled to a new trial, on the ground of surprise.⁶⁸ In another case a new trial was ordered on the affidavits which had been prepared for a continuance, the decision being given during their preparation.⁶⁹

§ 196. Surprise consisting in violation of agreements and misleading information by opposite party or counsel.

As a rule, parties may not rely upon statements of the adverse party, or upon stipulations not entered into with legal binding force and effect; but cases have come before the courts which exhibited very bad faith, and in which justice strongly demanded, not the enforcement of such stipulations, but relief from the consequences of reliance upon them on a proper motion. In *Robertson v. Williams*,⁷⁰ it was held that while oral stipulations are not binding, yet reliance upon the word of a reputable attorney may be excusable neglect, for which relief may be granted on the ground of surprise. Where a verdict is taken for plaintiff under an agreement of counsel, and plaintiff, through his counsel, subsequently refuses to carry

⁶⁷ See ante, § 32.

⁶⁸ *Simpkins v. White*, 43 W. Va. 200, 27 S. E. 241.

⁶⁹ *Getzian & Co. v. McCollum*, 8 S. Dak. 186, 65 N. W. 1063.

⁷⁰ 81 Cal. 268, 22 Pac. 665. The language of the court in this case cannot stand the test of criticism. The decision was correct, however. The "excusable neglect" simply meant that there was no valid objection on the score of reasonable prudence or diligence.

cident or surprise which ordinary prudence could not have guarded against," as a ground for a new trial, does not include ignorance, mistakes, nor misapprehension of an attorney, not occasioned by the adverse party, nor mismanagement of the case by the attorney, through design, ignorance or negligence.⁷³ But relief will be granted in this form where there enters into the conduct of the attorney from which the prejudice results the element of fraud or there are appearances of collusion with the opposite party. And where a note was given an attorney with the understanding that he should serve as counsel both before the examining magistrate and after indictment, if the maker should be indicted, but before his indictment a judgment was recovered on the note, and the attorney became a judge and therefore unable to perform his agreement, it was held that a new trial, applied for in due time, should be granted in the action where judgment was rendered on the note.⁷⁴ And the abandonment of a cause by plaintiff's counsel, without notice to him and in the midst of the trial, was held ground for a new trial.⁷⁵ So, where the attorney for a nonresident defendant corporation formed a partnership with the attorney for the plaintiff, withdrew from the case, and engaged another attorney to conduct the defense, without the knowledge or consent of the defendant or its resident agent, and so short a time

⁷³ *Holdeman v. Jones*, 52 Kan. 743, 34 Pac. 352; *Fincher v. Malcolmson*, 96 Cal. 38, 30 Pac. 835; *Preston v. Eureka Art Stone Co.*, 54 Cal. 198. See, also, *State v. Dreher*, 137 Mo. 11, 38 S. W. 567. Where ignorance and incompetency of attorney appointed by court is relied on as constituting surprise, it must be clearly shown that such attorney did not do his duty; *Fambles v. State*, 97 Ga. 625, 25 S. E. 365. Party held not surprised at the intoxication of his attorney, which he discovers during the trial; *Fitch v. Ellison*, 15 Colo. 418, 24 Pac. 872. The above decisions, in so far as they relate to neglect or mistake, are not applicable in Iowa, nor, it seems, in Kentucky, where the neglect and mistake, if excusable, are grounds for new trial: See *Peterson v. Koch*, 110 Iowa, 19, 80 Am. St. Rep. 261, 81 N. W. 160; *Prater v. Campbell*, 22 Ky. Law Rep. 1510, 60 S. W. 918.

⁷⁴ *Ablomich v. Greenville Nat. Bank*, 22 Tex. Civ. App. 273, 54 S. W. 794, case holding failure of counsel to stipulate, as directed by client, ground for new trial: *Kimball (W. W.) Co. v. Huntington*, 80 Wis. 270, 50 N. W. 177.

⁷⁵ *Donnelly v. McArdle*, 43 N. Y. Supp. 560, 14 App. Div. 217.

§ 199. Accident and surprise resulting in inability to attend trial.

It appears to have been held in *McKinley v. Tuttle*⁸² that a trial in the absence of the parties does not constitute an examination of an issue of fact so as to warrant relief from a decision and judgment rendered thereat. But such doctrine certainly is not sound in view of practical construction and subsequent decisions where an answer has been filed denying material allegations in the complaint.⁸³ Surprise concurrent with the absence of a party may consist in the taking up and trying his case out of prearranged order⁸⁴ or earlier than he had a right to suppose it would be reached for trial;⁸⁵ or it may be brought on for trial in his absence by conduct of the opposite party amounting to actual or legal fraud so as to constitute surprise entitling him to a new trial, as when a dismissed case was reinstated and pressed for trial by plaintiff without notice to defendant.⁸⁶

⁸² 34 Cal. 235; see ante, § 184.

⁸³ In *McGuire v. Drew*, 83 Cal. 225, 23 Pac. 312, motion for new trial treated in lower and appellate court as appropriate proceeding, though party absent from trial, new trial refused. In *Robertson v. Williams*, 8 Cal. 268, 22 Pac. 665, same except that order denying new trial reversed. To same effect, *Symonds v. Bunnell*, 80 Cal. 330, 22 Pac. 193.

⁸⁴ See *Fitzgerald v. Wygal*, 24 Tex. Civ. App. 372, 59 S. W. 21. In order to entitle a party to a new trial on the ground of accident and surprise, consisting in the fact that the date of trial was fixed by the bar and not by the court, whereby his counsel was absent at the trial, and judgment taken against him, he must show that the trial was thereby delayed or precipitated to his prejudicial: *International etc. Ry. Co. v. Miller*, 9 Tex. Civ. App. 104, 28 S. W. 233.

⁸⁵ See *Vittetow v. Ames*, 21 Ky. Law Rep. 225, 51 S. W. 1. Where judgment was rendered against a party in the absence of his attorney, who had employed another attorney to attend to the cause for him, giving him all necessary instructions, and the latter used ordinary diligence in proceeding by the usual all-rail route, but did not reach the place of trial until a few hours after judgment had been entered, and there were other cases for trial ahead of this one, unexpectedly disposed of—a new trial was granted under the code provision for a new trial in case “of accident or surprise, which ordinary prudence could not have guarded against”: *First Nat. Bank v. Harwick*, 74 Iowa, 227, 37 N. W. 171.

⁸⁶ *Chicago etc. Ry. Co. v. Deaver*, 45 Neb. 207, 63 N. W. 790. See

in his testifying differently from what he expected or failing to give expected testimony, except where a clear case of diligence be shown together with a probability of producing satisfactory evidence on the particular point with reference to which the surprise occurred, nor unless he has been in some respect misled by the conduct or representations of the witness. Of course, it is his duty to apply for a continuance at the time of the surprise, if the existence of such other evidence, or means of overcoming the surprise were known to him.⁸⁰ A case meeting all the legal requirements and which was held to present facts warranting the relief in this form was that of *Rodriguez v. Comstock*,⁸¹ in which the court said: "We furthermore consider that the defendants were surprised by the failure of their witness, and in the sense in which the term 'surprise' is used in the law of new trial. The parties applied to the witness seasonably in advance, and he then asserted that within his personal knowledge and recollection the fact in relation to which he was interrogated was with them. The defendant secured his attendance at the trial, together with that of an interpreter. When the witness was needed he was called to the stand, and on being inquired of, he completely defeated the just expectations that he had previously excited. It is of no moment, in our judgment, that the defendants did not, at that stage of the trial, move for a continuance; for at that time they did not know, and therefore could have given no assurances to the court, that a continuance would enable them to retrieve the disaster that had befallen them."

In such cases it must be fully shown that the party is prejudiced. This involves a showing that the testimony of the witnesses causing the surprise was not true;⁸² also, that there is at least a probability of a different result upon a retrial.⁸³

⁸⁰ See ante, § 191.

⁸¹ 24 Cal. 85, 88. See, also, *Wilson v. Brandon*, 8 Ga. 136; *Levy v. Brown*, 11 Ark. 16; *McFarland v. Clark*, 9 Dana, 184.

⁸² *People v. Jocelyn*, 29 Cal. 562; *Estate of Cartery*, 56 Cal. 470, 474.

⁸³ See ante, § 194; *Guy v. Hanley*, 21 Cal. 397, where unexpected testimony related solely to a point not involved in the action: *Klackenbaum v. Pierson*, 22 Cal. 160. In *Guy v. Hanley*, supra, the court said: "The motion for a new trial was based upon a statement of the evidence, and upon an affidavit alleging surprise on account of

In the third place the evidence with which the party expects to meet the surprise must be set forth.¹⁰² In the fourth place, the probability of a different result on a retrial should be clearly indicated;¹⁰³ and if it does not clearly appear from the foregoing parts of the affidavit, or affidavits, it may be shown by proper references to the record pertinent for the court's consideration in connection with such extrinsic matters. In the fifth place the rule requiring the best evidence of which the case admits should not be lost sight of;¹⁰⁴ and the affidavits of any new witnesses relied on should accompany the application, or their absence should be explained.¹⁰⁵

¹⁰² *Cohen v. Alameda (City of)*, 124 Cal. 504, 57 Pac. 377; *Clifford v. Denver etc. R. R. Co.*, 12 Colo. 125, 20 Pac. 333.

¹⁰³ *Patterson v. Ely*, 19 Cal. 28; *Guy v. Hanly*, 21 Cal. 399; *Brooks v. Johnson*, 122 Cal. 569, 55 Pac. 423; ante § 194. Although an affidavit of merits is usually required of defendant moving herein, it seems that where the motion is made at the same term, such affidavit is not required: *Mitchell v. Knight*, 7 Ohio C. C. 204.

¹⁰⁴ See *Schellhouse v. Ball*, 29 Cal. 605; *Rogers v. Huie*, 1 Cal. 429, 54 Am. Dec. 300.

¹⁰⁵ *People v. Bealoba*, 17 Cal. 389; *Rogers v. Huie*, 1 Cal. 429, 54 Am. Dec. 300; *Clifford v. Denver & S. P. R. R. Co.*, 12 Colo. 125, 20 Pac. 333, a clear case where the showing on ground of surprise was insufficient: *People v. Luchetti*, 119 Cal. 501, 51 Pac. 707.

§ 225. Rule that newly discovered evidence does not warrant a new trial if merely cumulative—Little or no value of the rule—Misleading definitions.

§ 226. Same—Decisions referring to cumulative, newly discovered, evidence.

§ 227. Must not be merely effective to impeach witnesses.

§ 228. No objection to corroborative evidence, as such.

§ 229. Affidavits of party and counsel.

§ 230. Affidavits of witnesses.

§ 204. Scope and difficulties of the subject.

If all that has been written and officially published from time to time on this subject were collated and republished it would fill several good-sized volumes; and yet it is a rather restricted subject. The student, or young practitioner, we will suppose, takes up a common-law treatise on practice and first reads some of the general definitions and rules on the subject of newly discovered evidence. They appear upon cursory reading to make it all very clear; first, as to what constitutes newly discovered evidence, and secondly, as to the conditions and limitations upon its use. But when he becomes a full-fledged practitioner, having occasion to seek a new trial on this ground and to present judicial authorities, he will find no little inconsistency in the adjudications, and considerable confusion resulting from hasty, loose and inconsiderate judicial expression. If a California lawyer, he turns to section 657 of the Code of Civil Procedure—and if in some other state he is apt to find a statutory provision substantially the same; he finds to be given as one of the grounds for new trial “newly discovered evidence, material to the issue, which by reasonable diligence could not have been produced at the trial.” In some states the ground expressed is simply “newly discovered evidence.” In one or two states, no such ground for new trial is recognized as available on motion in the same court. But, reverting to our young practitioner, he soon finds that what appears at first so simple, is but a guide board to an almost limitless field of investigation. The legal meaning of the adjective prefix “newly discovered,” is easy of ascertainment; but the thing itself “evidence” calls for a knowledge of the means known to the law by which an ultimate fact is proven or disproven, and an acquaintance with the case already made,

merits, in preference to perpetuating a decision resting upon a trial at which only part of the merits were presented for consideration.

It will be the purpose of the remaining sections of this chapter to present the law covering this ground for the motion, more clearly and fully than it has ever been presented.

§ 205. Statutory provisions—General requirements.

This ground, as stated in the statute, is in the Code of Civil Procedure of California, newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial;¹ and in the Penal Code of California, as follows: "When a verdict has been rendered against the defendant, the court may, upon his application, grant a new trial, in the following cases only: When new evidence is discovered material to the defendants, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendants must produce at the hearing in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable."² The only difference in the law governing the procedure in the two classes of cases is that in criminal cases it is expressly required that the affidavits of witnesses must be produced. In civil cases the absence of such affidavits may be excused by a proper showing, the requirements of which will be hereinafter stated.

These provisions in the same form have always been in the two respective codes. There has never been any change in the provision applicable to civil cases; but prior to the adoption of the Penal Code, newly discovered evidence was not one of the statutory grounds for new trial, and consequently was not recognized as a ground for the motion.³

¹ Subd. 4, § 657.

² § 1181, subd. 7.

³ *People v. Bernstein*, 18 Cal. 699.

judge is the element of disfavor and suspicion regarding the motion when based on this ground. And often when appellate courts refer to the discretion of the trial judge in passing upon the orders of trial courts, such reference is coupled with a mention of the disfavor and suspicion, with which the motion is regarded.⁵ It is true that a strong showing should be required, but it is difficult to see why an application on this ground which conforms to the requirements of law as established by the decisions should be viewed with any more disfavor and suspicion than any other ground which must be presented on affidavits. And the higher courts have recently shown a decided tendency to omit reference to disfavor and suspicion, in reviewing orders on motions, based on this ground, and to refer to the discretionary province of trial courts in the same general terms as where the motion was based on other grounds.⁶ And while the refusal to grant a new trial on the ground of newly discovered evidence is a matter largely within the discretion of the trial court, yet, if it appears that the evidence is material, could not have been discovered with reasonable diligence by the party applying for a new trial, and other requisites of the application appear, appellate courts generally reverse the ruling.⁷ And a new trial is especially

⁵ See *People v. Freeman*, 92 Cal. 359, 28 Pac. 261; *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *People v. Howard*, 74 Cal. 547, 16 Pac. 394; *Spottiswood v. Weir*, 80 Cal. 448, 22 Pac. 289; *Harralson v. Barrett*, 99 Cal. 607, 34 Pac. 342; *Tibbet v. Sue*, 125 Cal. 544, 56 Pac. 160, as to discretion of trial court. See, also, *Anderson v. Medbery* (S. Dak.), 92 N. W. 1087.

⁶ See *People v. Messag*, 3 Cal. 580, 29 Pac. 116; *People v. Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833; *People v. Clarke*, 130 Cal. 642, 63 Pac. 138; *Doyle v. Turla*, 38 Cal. 456; *Mowry v. Raabe*, 89 Cal. 606, 27 Pac. 157; *Heintz v. Cooper*, 104 Cal. 668, 38 Pac. 511; *O'Rourke v. Vennekohl*, 104 Cal. 254, 37 Pac. 930; *Tibbet v. Sue*, 125 Cal. 544, 56 Pac. 160; *Pengilly v. Case* (J. J.) *Threshing Mach. Co.* (N. Dak.), 91 N. W. 63; *Longley v. Daly*, 1 S. Dak. 257, 46 N. W. 247; *McNeile v. Cridland*, 6 Pa. Supr. Ct. 428; *Voltkammer v. Nassau Electric etc. Co.*, 23 App. Div. 88, 48 N. Y. Supp. 372; *State v. Armstrong*, 48 La. Ann. 314, 19 South. 146; *State v. Don Carlos*, 38 S. C. 225, 16 S. E. 832.

⁷ See *State v. Stowe*, 3 Wash. 206, 28 Pac. 837. In this case, after referring to the discretion to be conceded to lower courts, the court said: "Still, if this court thinks that, under all the circum-

covered, by which expression is meant that it must have been discovered since the trial. If discovered before, or at the trial, and no continuance of the trial was applied for, an answer to the motion that no diligence is shown will be sufficient to defeat it, no matter what else may be shown.⁹ And since each party, and especially their counsel, are presumed to be familiar with the issues, and to know what proofs will be required to sustain his own allegations or to meet and overthrow such as may be adduced in support of those against him, it is not enough to present a showing that he did not know, or did not discover until, since the trial, the materiality of the evidence. It is the evidence itself, and not merely its materiality which must appear to have been newly discovered.¹⁰ But it would be very difficult to state any rule, or principle, applicable to the subject of newly discovered evidence to which there are no exceptions; and it was held that this rule did not apply where there was no reason to suppose that evidence within the knowledge of the party was material.¹¹ The moving party must show by his own affidavit that the new evidence was not known to him at the time of the trial. Upon that question the affidavits of other persons are not sufficient.¹² Evidence may be

fect or otherwise, would naturally tend to mislead the defendant, and the plaintiff cannot complain if it in fact had such effect," and the judgment was reversed and a new trial ordered.

⁹ See *Curran v. Stange Storage Co.*, 98 Wis. 598, 74 N. W. 377; *Robinson v. Veal*, 79 Ga. 633, 7 S. E. 159; *Riley v. Shannon*, 19 E. 1. 503, 34 Atl. 989. See, also, post, §§ 229, 230.

¹⁰ *People v. Sutton*, 63 Cal. 243; *People v. Urquidas*, 96 Cal. 239, 31 Pac. 52; *Berry v. Metzler*, 7 Cal. 418.

¹¹ *Hess v. Sloane*, 62 N. Y. Supp. 666, 47 App. Div. 585. Held otherwise in *Gains v. White*, 2 S. Dak. 410, 50 N. W. 901.

¹² *Arnold v. Skaggs*, 35 Cal. 84. See, also, *Brost v. Moore*, 44 Minn. 470; *State v. Lucas*, 147 Mo. 70, 47 S. W. 1067; *State v. Soper*, 149 Mo. 217, 49 S. W. 1007; *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 41 S. W. 443; *State v. Bussamus*, 108 Iowa, 11, 78 N. W. 700; *State v. Moats*, 108 Iowa, 13, 78 N. W. 701; *Russell v. Oliver*, 73 Tex. 11, 4 S. W. 264. In *Arnold v. Skaggs*, supra, the court said: "The affidavit of the defendant fails to show that he was not cognizant of the alleged insanity of Arnold before or at the time of the trial. The affidavits of Frey and Thomas both show, it is true, that they informed the defendant of Arnold's supposed insanity after the trial, and that they verily believed that he [the defendant] was

attorney alone showing a want of knowledge sufficient. The affidavit of the party himself showing that the existence of the evidence was not within his knowledge must be also presented.¹⁵ And where the evidence sought from the witness, on account of whose absence a continuance was asked, was for the purpose of proving certain statements made by the defendant before a jury of which those witnesses were members, it was held, the evidence must have been within the knowledge of the accused at the time of the trial, and that it could not be deemed newly discovered.¹⁶ In another case it was held that the arrival of a deposition during the trial without the knowledge of a party will not constitute the basis of a motion for new trial on the ground of newly discovered evidence.¹⁷ And in an action of claim and delivery for trays, the proposed testimony of the manager of the lumber company that furnished the trays, as to the purchase thereof by the plaintiffs at the former trial, was held not to be newly discovered evidence.¹⁸ And it was held in case of an application by a corporation that the affidavit should have negatived knowledge at or before the trial of the alleged new evidence, by all other officers of the corporation, as well as of the one making the affidavit.¹⁹ On

conveyance as ground for new trial: *Wildman v. Wildman*, 72 Conn. 162, 44 Atl. 224.

¹⁵ *Morgan v. Bell*, 41 Kan. 345, 21 Pac. 255; *State v. Magers*, 36 Or. 38, 58 Pac. 892; *North v. State*, 108 Ga. 551, 29 S. E. 423. That affidavit of both party and his counsel should be presented, see *Nebraska Tel. Co. v. Jones*, 60 Neb. 396, 83 N. W. 197; *Broat v. Moore*, 44 Minn. 468, 47 N. W. 55. In *State v. Magers*, supra, the court said: "There was no showing that the supposed newly discovered evidence was not known to the defendant prior to and during the time of the trial. Such a showing is essential, and without it, a new trial should never be granted."

¹⁶ *State v. Hanks*, 39 La. 234, 1 South. 458.

¹⁷ *Tyler v. North Am. Transp. & Tr. Co.*, 24 Wash. 252, 64 Pac. 162. In this case, the court said: "It is evident that counsel for each party at the trial were anticipating this deposition. Of course, there was notice of its taking, and either counsel could have been advised of its contents."

¹⁸ *Butler v. Estrella Raisin Vineyard Co.*, 124 Cal. 239, 56 Pac. 1040.

¹⁹ *Lee-Kinsey Implement Co. v. Jenks*, 13 Colo. App. 265, 268, 57 Pac. 191.

in will not be interfered with except in case of abuse of discretion, or as the same idea is sometimes expressed, to prevent obvious injustice.²⁴ It may be stated, as a general principle of law, that a new trial will not be granted on the ground of newly discovered evidence, if the evidence might have been discovered by reasonable diligence in time to have been produced at the trial.²⁵ And the materiality of the new evidence cannot be considered as an excuse for the lack of dili-

²⁴ "Diligence is a relative term, incapable of exact definition and depends essentially upon the particular circumstances of each case": *Heintz v. Cooper*, 104 Cal. 668, 38 Pac. 511. All circumstances, including the situation of the parties and of the newly discovered witness, will be considered: *Sturdy v. St. Charles Land etc. Co.*, 33 Mo. App. 44.

²⁵ *People v. Ching Hing Chang*, 74 Cal. 389, 16 Pac. 201; *Bartlett v. Hogden*, 3 Cal. 57; *Stoakes v. Monroe*, 36 Cal. 383; *Butler v. Vassault*, 40 Cal. 74; *Russell v. Dennison*, 45 Cal. 337; *People v. Lewis*, 61 Cal. 367; *Ross v. Sedgwick*, 69 Cal. 247, 10 Pac. 400; *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *People v. Howard*, 74 Cal. 547, 16 Pac. 394; *People v. Leong Yune Gun*, 77 Cal. 636, 20 Pac. 27; *People v. Urquidas*, 96 Cal. 239, 31 Pac. 52; *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006; *Goose River Bank v. Gilmore*, 3 N. Dak. 188, 54 N. W. 1032; *People v. Warren*, 130 Cal. 683, 63 Pac. 86; *Galvin v. Palmer*, 113 Cal. 46, 45 Pac. 172; *People v. Brittan*, 118 Cal. 409, 50 Pac. 664; *State v. Davis (Idaho)*, 53 Pac. 678; *Lander v. Miles*, 3 Or. 40; *Howard v. Winters*, 3 Nev. 539; *O'Rourke v. Vennehohl*, 104 Cal. 254, 37 Pac. 930; *Martin v. Hazard Powder Co.*, 2 Colo. 600; *Outcalt v. Johnson*, 9 Colo. App. 519, 525, 49 Pac. 1058; *Crater v. McCormick*, 4 Colo. 199; *Caruthers v. Pemberton*, 1 Mont. 111; *Garfield etc. Co. v. Hammer*, 6 Mont. 63, 8 Pac. 153; *Nesbit v. People*, 19 Colo. 441, 462, 36 Pac. 221; *Boston v. Laws (Colo. App.)*, 35 Pac. 284; *Kloppenstine v. Hays*, 20 Utah, 45, 57 Pac. 712; *State v. Power*, 24 Wash. 34, 63 Pac. 1112; *People v. Peacock*, 5 Utah, 237, 14 Pac. 332; *United States v. Eldredge*, 5 Utah, 161, 13 Pac. 673; *Wilson v. Waldron*, 12 Wash. 149, 40 Pac. 740; *Bullock v. White Star S. S. Co. (Wash.)*, 70 Pac. 1106; *Cheesney v. Nebraska & C. Stone Co.*, 41 Fed. 740; *Wilson v. Seaman*, 15 S. Dak. 103, 37 N. W. 577; *Liggott v. People*, 26 Colo. 364, 58 Pac. 144; *Weinburg v. Sompas (Cal.)*, 33 Pac. 341; *Gaines v. White*, 1 S. Dak. 434, 47 N. W. 524; *Demmon v. Mullen*, 6 S. Dak. 554, 62 N. W. 380. Rule as to diligence in South Dakota stated: *Ochsenreiter v. Bagley El. Co.*, 11 S. Dak. 91, 75 N. W. 822. Showing held sufficient to warrant new trial where witness whose testimony was required resided one hundred miles distant from

fused.²⁸ It is the duty of the litigant to make full disclosure of the names and whereabouts of witnesses, and of the existence of evidence to his counsel; and it was held that a new trial was properly refused where sought on the ground of newly discovered evidence which was known to the movant before the trial but not communicated to his attorney, though movant was himself absent from the trial.²⁹

Hundreds of cases might be added to those here cited, wherein the above rule is declared, and in a majority of cases it has been adhered to, simply, because the demands of justice did not call for either a higher or a lesser degree than what is known in general law, and designated in the statute as reasonable diligence. But in many other cases the courts have done what may be either considered as giving a strangely liberal and perverted interpretation to the statute, or as substituting, sometimes the greatest, and at other times the slightest, for reasonable diligence. And there are instances in which they have excused any showing of diligence whatever, and unequivocally declared that there were exceptions to the rule, notwithstanding its legislative origin. In view of this laxity of interpretation, or rather of administration, decisions illustrating and exemplifying what the courts have held constituted and did not constitute a sufficient showing, of diligence in par-

litigants from the consequences of their own laches, thoughtlessness or negligence. The law demands of the parties all reasonable diligence and caution in preparing for trial, and furnishes no relief for the hardships resulting from inexcusable negligence or want of diligence. When, therefore, a new trial is sought because of newly discovered evidence, it should most certainly be shown by the party making the application that his failure to produce such evidence at the first trial was not the result of any negligence upon his part. Of that fact the court should be perfectly satisfied. To grant new trials upon this ground, where no such showing is made, would simply be giving encouragement to negligence, and judicial approval to inexcusable carelessness." To same effect, *Toney v. Toney*, 73 Ind. 36; *Zicksafoose v. Kuykendall*, 12 W. Va. 30; *Atkinson v. Conner*, 56 Me. 550; *Blake v. Madigan*, 65 Me. 530; *Brown v. Luehrs*, 95 Ill. 197.

²⁸ *Chapin v. Goodell*, 2 Colo. 608, 611.

²⁹ *Thieler v. Miller*, 53 Kan. 515, 42 Am. St. Rep. 304, 36 Pac. 1060. See, also, *Gaines v. White*, 1 S. Dak. 434, 47 N. W. 524.

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ure to investigate with reference to the knowledge of witnesses to facts in issue that they are intimates of the opposite party, especially where the affidavit does not clearly show such relations as would prevent his obtaining from them any information within their power to give.³² And it was held that a defendant convicted of manslaughter as the result of an abortion procured by him was properly denied a new trial on the ground of newly discovered evidence, because of lack of reasonable diligence on his part in procuring the evidence earlier, when it appeared that the newly discovered evidence was that of a nurse whom defendant employed to care for the deceased, that he had been at liberty all the time prior to the trial and knew the whereabouts of the nurse, but had never sought and questioned her as to her knowledge concerning matters that would be subject to inquiry at his trial.³³ And the same conclusion was reached where the alleged new witness was known by the moving party to have been at the time of the accident on the same train which caused the injuries investigated at the trial.³⁴ Nor will a new trial be granted for newly discovered evidence to be given by certain witnesses, where it appears that others who could have attended the trial and testified to the same facts were not subpoenaed.³⁵ But where defendant at the trial knew nothing of certain admissions of a

be so contradictory to another statement therein as to discredit the affiant and defeat a new trial. The second case above is such an instance. The court said: "Was the showing of newly discovered evidence sufficient to justify the court in granting a new trial? We think not. It is stated by Catlin in his affidavit that he had learned that one George Pannick would testify to certain things. For all that appears, his knowledge of what Pannick would testify to was obtained through hearsay sources only. Moreover, there is a flat contradiction in his statement that he had learned since the trial that Pannick would testify to certain facts, and the subsequent statement contained in his affidavit that he had tried to ascertain Pannick's whereabouts before trial. He must have had reason to believe that Pannick could furnish him with some evidence if he inquired for him before the trial."

³² Walling v. Warren, 2 Colo. 434, 441.

³³ State v. Power, 24 Wash. 34, 63 Pac. 1112.

³⁴ Wherry v. Duluth etc. Ry. Co., 64 Minn. 415, 67 N. W. 223.

³⁵ Austin v. State (Tex. Cr. App.), 51 S. W. 249.

competency of witnesses and admissibility of evidence, as he is presumed to be, and his counsel at the trial be also deficient herein, he may not be granted a new trial upon the acquisition of further knowledge on the subject pursuant to, or as a result of the first trial. Accordingly, it was held that the plaintiff in an action against the administrator of the estate of a decedent, on a claim against the estate, was not entitled to a new trial on the ground of newly discovered evidence, when the only reason assigned for not producing the evidence on the trial was that he supposed he had a right to testify personally on the trial, and for that reason made no effort to produce other evidence in support of his claim.³⁹ In this case the court said: "Appellant now claims that, 'having relied on his right to testify in the cause, he made no provision to sustain his case by other evidence.' The fault, he claims, was that of his attorney, in not advising him of the statute prohibiting him from testifying; and he did not know of this prohibition till too late to find other testimony. The attorney believed that in such a cause of action he could testify. Having been denied this privilege, he was thrown, as it were, hors de combat, and the newly discovered evidence entitled the plaintiff to a new trial. The discovery which plaintiff and his counsel made seems to have been one of law rather than one of fact or evidence."

§ 213. Same—Duty to examine public records, search for lost papers, and introduce secondary evidence.

It is the clear duty of parties to a litigation to acquaint themselves with that which is, or may be, the common knowledge of every individual, whether or not directly interested, where it affects the question to be litigated. And it was held a new trial should not be granted on the ground of newly discovered evidence which was alleged to be a deed, recorded in the county recorder's office a year before the trial, and the record of a judgment in the same court in which the cause was tried.⁴⁰ On like principle it is also their right and duty, in case of loss of documentary evidence which is important and material,

³⁹ *Bagnall v. Roach*, 76 Cal. 106, 18 Pac. 137.

⁴⁰ *Weimer v. Lowery*, 11 Cal. 104.

the alleged newly discovered evidence was a witness at the former trial, or was a party attending, will usually defeat the motion because of the neglect of the movant to examine him as a witness, or to fully cross-examine him when called by the opposite party, and thus elicit all the knowledge in his possession.⁴³

§ 215. Same—Duty to acquire knowledge of objects and transactions brought to attention of party.

It often appears on the face of the application, and upon a bare statement of the fact alleged to have been newly discovered that there was a degree of neglect involved in the failure of the party to acquire knowledge of the fact. Thus, where after the trial of an action to recover certain grain, or its value, plaintiff having elected to take a money judgment, defendant weighed the grain and found that it was of less value than appeared on the trial, it was held no ground for a new trial, as the evidence was attainable on the first trial.⁴⁴

§ 216. Same—Duty to apply for continuance.

It is obvious that if a party is sufficiently informed as to what evidence a person not subpoenaed and not attending the trial will furnish to warrant a continuance on his account upon a proper showing of diligence, such evidence would not usually fall within the meaning of evidence newly discovered after the trial, and the ground which he would assign for the motion usually would be abuse of discretion in refusing a continuance,

⁴³ See *Rogers v. Marshall*, 18 Fed. 59, 64; S. C., 3 McCrary, 87, where the witness had been called and examined at former trial; *People v. Phelan*, 123 Cal. 551, 56 Pac. 424, failure to cross-examine witness for prosecution; *People v. Miller*, 33 Cal. 99, where rule applied to codefendants jointly indicted; *Diendorfer v. Bachmor*, 12 S. Dak. 285, 81 N. W. 297, where affiant had testified at the trial without disclosing the fact; *Bowling v. Floyd*, 5 Kan. App. 879, 48 Pac. 875, case of failure to attend taking of deposition and cross-examine witness; *Missouri etc. Ry. Co. v. Rack*, 21 Tex. Civ. App. 667, 52 S. W. 986, case of failure to cross-examine; *Achorn v. Andrews (Me.)*, 12 Atl. 793, and *Poullaine v. Poullaine*, 79 Ga. 11, 4 S. E. 81, cases in which witness was examined at the trial generally on same subject.

⁴⁴ *Norris v. Hix*, 74 Iowa, 524, 38 N. W. 395.

The acts which were performed and which are supposed to constitute the diligence required by law should be specifically stated in order that the court may determine what diligence was used.⁵⁴ Stated somewhat more fully, the application of a party for a new trial on the ground of newly discovered evidence must show what diligence he exercised in preparing for the first trial, how the new evidence was discovered and why it was not discovered before the trial, and such facts as make it clear that the failure to produce the evidence was not through any fault or want of diligence of the applicant.⁵⁵ And it should also state in what the alleged newly discovered evidence consists, so that the court may judge of its materiality, competency, weight and effect.⁵⁶ For instance, an affidavit stating that diligent search for certain evidence was made is insufficient since it gives the court no information as to the ef-

⁵⁴ *Butler v. Vassault*, 40 Cal. 74; *Schnurr v. Stults*, 119 Ind. 429, 21 N. E. 1089; *Hoban v. Sandford etc. Co.*, 62 N. J. Supp. 426, 45 Atl. 819; *Bradley v. Norris*, 67 Minn. 48, 69 N. W. 624, where statement in affidavit that affiant had "exercised the greatest diligence" in searching for evidence; *Wilcox v. Joslin*, 56 Hun, 645, 10 N. Y. Supp. 342, where statement was that party had "used every effort he thought necessary; *Patterson v. Collier*, 77 Ga. 292, 3 S. E. 119, statement that inquiry was made of numerous persons, names of persons not being given nor any excuse for omitting them; *Richter v. Meyers*, 5 Ind. App. 33, 31 N. E. 582, to same effect; *Pemberton v. Johnson*, 113 Ind. 538, 13 N. E. 801, to same effect; *McDonald v. Coryell*, 134 Ind. 493, 34 N. E. 7, where failure to state time and place of making inquiries, and circumstances under which made, was held to render the showing insufficient. But an affidavit by defendant in a libel suit stated that before the trial he made inquiry of a great many persons that he supposed knew, or would be likely to know, facts showing the truth of his statements as to any of the matters in issue, and in each and every instance pursued each and every line or hint of evidence with diligence to the full extent of his ability, was held a sufficient showing of diligence, though it did not state the persons of whom inquiry was made. Held, also, unnecessary to show ignorance of defendant's counsel: *Bogges v. Read*, 83 Iowa, 548, 50 N. W. 43.

⁵⁵ *Barton v. Laws*, 4 Colo. App. 212, 218, 35 Pac. 284. To same effect, *People v. Kloss*, 113 Cal. 567, 47 Pac. 459.

⁵⁶ *Lee-Kinsey Implement Co. v. Jenks*, 13 Colo. App. 265, 289, 57 Pac. 191. See, also post, § 230.

mental faculties of a plaintiff, suing to recover damages for personal injuries had not been fully restored at the time of the trial, it was held that the court should not require of him the same diligence that would be required of one not under such disability.⁶³ The rule has been relaxed in certain cases of concealment by the opposite party to such degree as to really constitute exceptions to the rule, though not so designated by the courts.

In the case of *Blewett v. Miller*⁶³ the report does not disclose any showing of diligence whatever, and the language of the court implies that the showing was weak. But the fact that the successful party, though a witness, had carefully refrained from disclosing a material fact unknown to the movant, was held to excuse a strict showing of diligence. And where the new evidence consisted largely of statements of the prevailing party to third persons, and it was shown that the other party had no knowledge of the same until after the trial, and only discovered it from clues developed at the trial, it was held not necessary to show a high degree of diligence in seeking to obtain evidence of that nature.⁶⁴ In another case it was held a new trial should be granted for newly discovered evidence, though the witness who would give it was at the first trial, where the matter to be proved by him was a secret agreement, of which the party applying for the new trial had no knowledge at the time.⁶⁵ But in such a case there should at least be a very clear general showing of diligence, and the existence of every circumstance calculated to put the party on inquiry as to any knowledge possessed by such witness should be negatived. Sometimes, however, in criminal cases, considerable lapses from the requirements of the rule are excused. In one

⁶³ *Berberich v. Louisville Bridge Co.*, 20 Ky. Law Rep. 467, 46 S. W. 691.

⁶⁴ 131 Cal. 149, 152, 63 Pac. 157.

⁶⁵ *Missouri Pac. Ry. Co. v. Lovelace*, 57 Kan. 195, 45 Pac. 590.

⁶⁶ *Stokes v. Stokes*, 54 N. Y. Supp. 319, 34 App. Div. 423. But see *Chicago etc. R. Co. v. McKeehan*, 5 Ind. App. 124, 31 N. E. 531, holding that the neglect of a party to interview a witness in his behalf is not excused on the ground that such witness had agreed to conceal his information from the party urging it as newly discovered evidence.

light some new fact bearing upon the main question, and it would be likely to change the result, a new trial should be granted.⁷¹ Or as otherwise expressed, if the new evidence be material on that issue alone on which the verdict is based, it is sufficiently material to justify the granting of a new trial.⁷² But the materiality of the new evidence must be clearly shown by specific statement of facts, a general assertion of its ma-

⁷¹ *Gray v. Harrison*, 1 Nev. 502; *Flannagan v. Newberg*, 1 Idaho, 78; *Smith v. Chapel*, 36 Minn. 180, 30 N. W. 660; *Synon v. People*, 188 Ill. 609, 59 N. E. 508; *Hall v. Lyons* (W. Va.), 1 S. E. 582; *Brickley v. Walker*, 68 Wis. 563, 32 N. W. 773; *Beery v. Chicago etc. Ry. Co.*, 73 Wis. 197, 40 N. W. 687.

⁷² *McMullen v. Winfield Building etc. Assn.*, 4 Kan. App. 459, 46 Pac. 410. An attempt to cite even a large percentage of the adjudications on question of materiality would be vain. The following are fairly illustrative.

Materiality held sufficient to warrant new trial: *Cranmer v. Porter*, 41 Cal. 463, ejectment, conveyance of title to third person; *Kenezleber v. Wahl*, 92 Cal. 202, 28 Pac. 225, declarations and acts of defendant in conflict with defense; *Jones v. Singleton*, 45 Cal. 92, discovery after trial of lost note; *Blewett v. Miller*, 131 Cal. 149, 63 Pac. 157, discovery by defendant sheriff of evidence materially affecting amount of recovery against him; *Wall v. Trainor*, 16 Nev. 131, admissions of plaintiff against interest; *State v. Stowe*, 3 Wash. 206, 28 Pac. 337, clear evidence established an alibi; *La Fond v. Smith*, 8 Wash. 26, 35 Pac. 404, letter containing a notice; *Cairns v. Keith*, 50 Minn. 32, 52 N. W. 267, letter admitting party's liability; *Harrell v. Gregory*, 88 Ga. 170, admissions by party; *Collins v. Burge*, 20 Ky. Law Rep. 992, 47 S. W. 444, finding of lost will; *Wilcox Silver Plate Co. v. Barclay*, 48 Hun, 54, mistake in books in evidence (peculiarity of New York statute); *Peyser v. Coney Island etc. R. Co.*, 81 Hun, 70, 30 N. Y. Supp. 610, discovery of defect in electrical appliances; *Reiss v. Pelham* (Town of), discovery of concealed funds; *Bussey v. State*, 69 Ark. 545, 64 S. W. 268, retraction under oath of prosecuting witness; *Martin v. Clark*, 111 Wis. 493, 87 N. W. 451, where after court had given a construction to statute of another state put in evidence, a decision of the highest court in said state was produced giving the statute a different construction, materially affecting result favorably to the losing party; *Foye v. Turner*, 91 Me. 286, 39 Atl. 998, admission of prevailing party against interest; *Raub v. Nisbett*, 111 Mich. 38, 69 N. W. 77, new evidence supporting contention of losing party that instrument created a trust, instead of being an absolute conveyance as contended by prevailing party; *Smith v.*

ple v. Tallmage⁷⁶ the court though affirming the order denying a new trial said: "It cannot be said that, as a matter of law, a new trial should be granted whenever an important witness against the defendant shall make an affidavit that he committed perjury in his testimony; if that were so justice would be defeated in many grave cases." In Mann v. State⁷⁷ the decision was based upon facts which were somewhat exceptional. In that case the appellant was convicted of rape upon the person of a young girl, and without her testimony there was no shadow of a case against appellant. In her testimony at the trial she first said that the appellant was innocent, but, being examined by direct questions, she finally made statements tending to show the appellant's guilt. Afterward, upon a motion for a new trial, she made oath that her first statements when on the stand were true, and that she did not fully understand the bearing of the questions which she afterward answered, and that her answers to those questions were not true. Upon appeal the supreme court held that the motion for a nonsuit ought to have been granted. But its ruling rested upon a consideration of all the circumstances in the case, and the court said: "Looking at the entire case, including the affidavits, it is our opinion that the guilt of the appellant was left too uncertain, and the character of the evidence against him appeared too frail and unreliable to justify the court in refusing him another trial." There the ruling of the appellate court was not based upon the mere fact that a witness had afterward testified to perjury at the trial. In fact, there was no perjury, but a mistake; and the testimony of a witness that he was mistaken is certainly entitled to more consideration than a statement that he committed absolute perjury.

549. See, also, Mann v. State, 44 Tex. 642. In People v. Tallmadge, 114 Cal. 427, 431, 46 Pac. 282, the court, though affirming the order denying a new trial in that case, said: "No doubt that a case might arise where an important witness had afterward testified to having committed perjury, in which this court would hold, looking at the whole case, that a new trial ought to have been granted."

76 114 Cal. 427, 430, 46 Pac. 282.

77 44 Tex. 642.

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in different language, but the meaning is usually that above conveyed. The foregoing expression is equivalent to saying that the motion should not be granted, unless the court can see from the showing made that a different verdict will probably result from a retrial with the new evidence added.⁸⁰ In other words, in order to warrant a denial of the motion the court must be of the opinion that the admission of the new evidence would not cause a different result.⁸¹ It is also the equivalent of the rule as stated in other cases, namely, that if the newly discovered evidence fails to raise a reasonable presumption that if produced it would change the result, a new trial will not be granted,⁸² or that it might change the result.⁸³

As in all cases where the matter rests almost absolutely within the discretion of individual men, no specific rule of any value, subordinate to and definitive of the leading rule, and applicable generally, can be laid down. But the following attempt to state a more specific rule is at least worth considering: Where the newly discovered evidence is not conclusive against the opposing party, and is reconcilable with either plaintiff's or defendant's theory of the case, and the verdict already returned would be abundantly supported by the evidence, with the pro-

⁸⁰ *Byrne v. Reed*, 75 Cal. 277, 282, 17 Pac. 201; *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *People v. Howard*, 74 Cal. 547, 16 Pac. 394; *People v. Leong Yune Gun*, 77 Cal. 636, 20 Pac. 27; *Williamson v. Tobey*, 86 Cal. 497, 25 Pac. 65; *People v. Urquidas*, 96 Cal. 239, 21 Pac. 52; *Armstrong v. Davis*, 41 Cal. 494; *Barton v. Laws*, 4 Colo. App. 212, 35 Pac. 284; *United States v. Rio Grande Dam etc. Co.*, 10 N. Mex. 617, 65 Pac. 276; *Huster v. Wynn*, 8 Okla. 569, 56 Pac. 736; *Travelers' Ins. Co. v. Harvey*, 82 Va. 949, 5 S. E. 553; *Burlingame v. Cowee*, 16 R. I. 40, 12 Atl. 234; *McDonald v. Early*, 24 Neb. 818, 40 N. W. 410; *Reynolds v. Reynolds*, 53 N. Y. Supp. 135, 33 App. Div. 625; *Badger v. State*, 69 Vt. 217, 37 Atl. 296.

⁸¹ *Carr v. State*, 106 Ga. 737, 32 S. E. 844.

⁸² *Merk v. Gelzhaesser*, 50 Cal. 631. "Court must be satisfied that the newly discovered evidence would change the result": *Childs v. Lauterman*, 95 Cal. 359, 30 Pac. 553. Not granted unless "more than likely to change the result": *Hess v. Sloane*, 62 N. Y. Supp. 666, 47 App. Div. 585. Such evidence must be "very clear and satisfactory, and likely to affect the result": *Baumgarten v. Hoffman*, 9 Utah, 338, 34 Pac. 294.

⁸³ *Leschi v. Territory*, 1 Wash. Ter. 13.

to overrule the motion; otherwise is suggested as more proper rule in criminal cases: It is once shall be so important on which it is offered as to create, the trial, a preponderance in ce, but only that it create a The following was stated as ion by plaintiff for new trial ter a motion for nonsuit by re the evidence set out in affi es not supply the facts neces then the plaintiff's case where new trial upon such ground

; to warrant a new trial for st be conclusive in character. he matter in dispute.⁸⁵ This largely preponderating weight previous citations on the sub approach to, if, indeed, it is ntrols in the English courts vidence must be so conclusive that the verdict would be dif

nd on question of probability

y of a change in the result by , having ascertained that it is

l. Co., 86 Cal. 445, 25 Pac. 5.
n. 146; Hill v. Montgomery, 18 Ill. App. 300. See, also, Turner where same rule appears to have trial, on the ground of newly nted, unless the evidence is o mitted, the verdict would be e same effect, City of Chicago v. mt. R. Co. v. Truesdell, 68 Ill. 3, 49 N. E. 720.
l. S., 531.

such as entitles it to consideration, the court will, if necessary, examine and consider the record on the trial. Accordingly, the court was held fully warranted in denying the motion in view of the testimony of eye-witnesses, to which the affidavit of the new witness merely opposed by testimony of a threat of the deceased against the defendant, convicted of manslaughter.⁸⁷

The court will not only examine the general features of the case, but will examine the testimony of particular witnesses, in order to determine what consideration should be given to the new evidence. Thus, in *People v. McCauley*⁸⁸ the court said: "Nor was there any error in denying the application for a new trial. Irrespective of the weight to be given to the determination of the application of the court below, we are of opinion that the affidavit of Allen, upon which the motion was based in the main (and which goes to the question of the identity of the prisoner), is not reconcilable with the testimony which she herself gave at the trial."

§ 223. Same—Sufficient if material as to amount of recovery.

In order to warrant a new trial for material newly discovered evidence, it is not necessary that it bear exclusively upon the question of the plaintiff's right to a judgment for some amount. It will be sufficient if it affect the amount of the recovery. Accordingly, in an action for personal injuries, the court held that the defendant was entitled to a new trial on the following showing: The new evidence, if true, would make it clear that the personal injuries for which plaintiff recovered damages were not nearly so serious as represented by evidence on his behalf at the trial; that the injuries were such that defendant could not well be supposed able to have made them the subject of inquiry by independent affirmative evidence at the trial.⁸⁹

⁸⁷ *State v. Mims*, 36 Or. 315, 61 Pac. 888. See, also, *People v. McCauley*, 43 Cal. 146: "The affidavit offered as proof of newly discovered evidence may be such in connection with known or established facts in the case as to discredit its statements, and warrant the court in disregarding it": *State v. Mims*, *supra*.

⁸⁸ 45 Cal. 146, 148.

⁸⁹ *Jensen v. Hamburg-American Packet Co.*, 23 App. Div. 163, 48 N. Y. Supp. 630.

description of evidence, and the rule on the subject, if such it may be termed, is a mere invention and revision by the courts, the idea having been borrowed from precedents which antedate all statutory enactments on the subject. Then, if it be a correct rule—and that it is such cannot be denied—upon authority, that in all cases of newly discovered evidence calculated to produce a different result, a new trial is proper, what place have the descriptive terms “cumulative” and “merely cumulative” in a consideration of the subject? Few, if any, modern cases can be cited in which a new trial was held improperly granted by trial courts on newly discovered evidence possessing the above-mentioned force and qualities, merely because it was cumulative.⁹⁴ If the opposition to the proceeding urged its cumulative character, the courts have invariably answered that it was not “merely cumulative,” or have pro hac vice asserted an exception to the vague, shadowy and obsolete rule barring a new trial on newly discovered, “merely cumulative” evidence. And, in reason, if there be no such thing as merely cumulative evidence possessing sufficient potency to change the result upon retrial, why should not the latter universal and salutary test be solely applied and the other abandoned? Having shown that the term “merely cumulative” has no longer any office in the decision of cases under this head, it is in order to show by authority that the term “cumulative” is of no distinctive value herein. The rule, or rather, that which was from time immemorial asserted to be a rule, is that a new trial will not be granted upon newly discovered evidence which is “merely cumulative.”⁹⁵ It is equally as correct

⁹⁴ One case, and only one, is at hand in which such doctrine was openly asserted. In *Sisler v. Shaffer*, 43 W. Va. 769, 28 S. E. 721, it was said that the newly discovered evidence, if merely cumulative, did not justify setting aside a verdict, however apparently decisive it might be. But this language is self-contradictory. Such evidence is not merely cumulative.

⁹⁵ *Spencer v. Doane*, 23 Cal. 419; *Bartlett v. Hogden*, 3 Cal. 55; *Live Yankee Co. v. Oregon*, 7 Cal. 40; *Klockenbaum v. Pierson*, 22 Cal. 160; *Aldrich v. Palmer*, 24 Cal. 513; *Meyer v. Mowry*, 34 Cal. 514; *Levitsky v. Johnson*, 35 Cal. 41; *Stoakes v. Monroe*, 36 Cal. 383; *Doyle v. Sturla*, 38 Cal. 456; *Jones v. Jones*, 38 Cal. 584; *Russell v. Dennison*, 45 Cal. 337; *People v. McDonell*, 47 Cal. 134; *Reed v. Clark*, 47 Cal. 194; *Hobler v. Cole*, 49 Cal. 250; *People v. Anthony*,

to say that a new trial will not be granted for new evidence which is merely oral, meaning thereby that the evidence possesses only the distinctive quality of being oral. But it would be palpable error to say that a new trial will not be granted on oral evidence; nor can it be said with any more propriety that a new trial will not be granted on cumulative evidence. The law defines cumulative evidence as "additional evidence of the same character to the same point."⁹⁶ It is generally easy to determine whether proposed new evidence is additional to other evidence to the same point, but the question what constitutes evidence "of the same character" has never been determined, nor has any serious attempt been made to answer the question. It scarcely need be stated that newly discovered evidence cannot

56 Cal. 397; *Wilson v. Southern Pac. R. R. Co.*, 62 Cal. 164; *Reed v. Draia*, 67 Cal. 491, 8 Pac. 20; *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207; *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *Crystal Lake Ice Co. v. McAulay*, 75 Cal. 631, 17 Pac. 924; *People v. Golden-son*, 76 Cal. 328, 19 Pac. 161; *People v. O'Brien*, 78 Cal. 41, 20 Pac. 359; *Williamson v. Tobey*, 86 Cal. 497, 25 Pac. 65; *People v. Mesa*, 93 Cal. 580, 29 Pac. 116; *People v. Urquidas*, 96 Cal. 239, 31 Pac. 52; *People v. Lapique (Cal.)*, 67 Pac. 14; *People v. Chrisman*, 135 Cal. 282, 67 Pac. 136; *People v. Klass*, 115 Cal. 567, 47 Pac. 459; *Chalmers v. Sheehy*, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 709; *Martin v. Hazard*, 2 Colo. 596; *Cole v. Thornburg*, 4 Colo. App. 95, 34 Pac. 1013; *Outcalt v. Johnston*, 9 Colo. App. 519, 49 Pac. 1058; *Piela v. People*, 6 Colo. 343, 345; *State v. Brooks*, 23 Mont. 146, 57 Pac. 1038; *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153; *State v. Hill*, 39 Or. 90, 65 Pac. 518; *State v. Davis (Idaho)*, 53 Pac. 678; *Knollin v. Jones (Idaho)*, 63 Pac. 638; *Rogers v. Marshall*, 13 Fed. 59, 64; *Sheffer v. Corson*, 5 S. Dak. 233, 58 N. W. 555; *Demman v. Mullen*, 6 S. Dak. 554, 62 N. W. 380; *Chandler v. Thompson*, 30 Fed. 38; *Donnelly v. Burkett*, 75 Iowa, 613, 34 N. W. 330; *Hart v. Jackson*, 77 Ga. 493, 3 S. E. 1; *Pennsylvania Co. v. Nations*, 111 Ind. 207, 12 N. E. 809; *Smith v. Watson*, 82 Va. 712, 1 S. E. 96; *Westbrook v. Aultman, Miller & Co.*, 3 Ind. App. 83, 28 N. E. 1011; *Kaul v. Brown*, 17 R. I. 14, 20 Atl. 10; *Cleary v. Cummings*, 28 Ill. App. 237; *State v. Order*, 80 Iowa, 72, 45 N. W. 543; *Walker v. Brown*, 66 Tex. 556, 1 S. W. 797; *Klein v. Gibson*, 8 Ky. Law Rep. 343, 2 S. W. 116; *Dallman v. Munson*, 90 Mo. 85, 2 S. W. 134; *Baker v. Moor*, 84 Ga. 136, 10 S. E. 737; *Jones v. Chicago etc. R. Co.*, 42 Minn. 183, 43 N. W. 1114; *Bigelow v. Sickles*, 75 Wis. 427, 44 N. W. 761; *Carder v. Bank of West Virginia*, 34 W. Va. 38, 11 S. E. 716.

⁹⁶ Cal. Code Civ. Proc., § 1838.

be excluded from consideration as "cumulative" or as "merely cumulative," adhering to the code definitions of these terms, because additional to the same point, unless it can be also seen to be "of the same character." There are four kinds, or "characters," of evidence mentioned in the California Code of Civil Procedure⁹⁷—namely, the knowledge of the court, the testimony of witnesses, writings and other material objects presented to the senses. It has been frequently held that the phrase "of the same character," used in the law defining cumulative evidence, has no reference to the division of evidence into oral (testimony of witnesses) and documentary (writings);⁹⁸ and the reasons underlying such decisions forbid it referring to any such division of evidence at all as that found in the California Code of Civil Procedure. It has never been claimed, nor is there any reason for any assertion to the effect that the phrase has any reference to the conventional division of evidence into direct and circumstantial. Then "cumulative," as used in law, simply means additional evidence upon the same point, and the term should be understood and used in law as it is ordinarily used, as when one speaks of additional things, or additional force for the same purpose. All corroborative evidence is cumulative, but not all cumulative evidence is corroborative. All relevant, competent and material newly discovered evidence is cumulative, but if it be of sufficient probative materiality and force to change the result upon retrial, it is not "merely cumulative."

§ 226. Same—Decisions referring to cumulative newly discovered evidence.

The strongest support adducible for the propositions advanced in the next preceding section is found in the decisions of the courts, without which radical views of the law are, as a rule, unfavorably received. In the first place, there are cases in which, though it was in order and entirely proper that the court should decide whether certain newly discovered evidence was, or was not, cumulative, the question was evaded and other reasons found for the decision pronounced. In *Stoakes v.*

⁹⁷ § 1827.

⁹⁸ *Brown v. Wheeler*, 62 Kan. 676, 64 Pac. 594.

Monroe⁹⁹ one of the objections urged in support of the order of the trial court denying the motion was that the new evidence was simply cumulative. The supreme court, in affirming the order, said: "It is perhaps unnecessary to discuss the other propositions involved in the motion further than to say that, if for no other reason, we should be most reluctant to disturb the ruling of the court below on the facts appearing in the record, not being satisfied that there is reasonable ground to believe that the newly discovered evidence would change the result on another trial." In *Kenezleber v. Wahl*,¹⁰⁰ where counsel laid particular stress upon the point that the new evidence was cumulative, the court said: "Nor was there any evidence whatever given upon the trial of the case of the declarations and acts of the defendant as set forth in the affidavits. It therefore follows that such evidence was entirely new, distinct and material to the issue, and it is perfectly fair to presume that if it had been produced before the jury at the trial of the case, the verdict would have been different. We would state in this connection that where the question as to whether the evidence is cumulative is involved in doubt, it then becomes a matter of discretion; and unless there has been a manifest abuse of it by the trial court, this court will not interfere." This language implies that the question is one of fact rather than of law. If so, it is hardly a proper subject for a code definition. In the second place, the expressions of different courts wherein definitions of cumulative evidence have been attempted, with reference to newly discovered evidence, are in hopeless conflict with each other and with the code definitions. The statutory use of the word "point" cannot be reasonably construed to mean a subordinate point in a case. It is not so limited in terms, and it often happens that there is only one point in a case. Courts, losing sight of this feature of the definition, have sometimes stated that evidence was cumulative if it tended to prove, or disprove, a fact of secondary importance to the ultimate fact in issue, but in such cases they overlook the principle and the fact that between ultimate and probative facts there is only one step; so that there are no "points" in any case other than those which arise on the plead-

⁹⁹ 36 Cal. 383, 389.

¹⁰⁰ 92 Cal. 202, 208, 28 Pac. 225.

ings. Nor have they attempted to reconcile such views with the general terms used in defining cumulative evidence.¹⁰¹ These decisions are also in conflict with others which refer the question of cumulation to a main issue maintained by one side and controverted by the other.¹⁰² In the third place there are cases in which the courts have not seen fit to let the proposition that merely cumulative newly discovered evidence may be sufficient to warrant the granting of a new trial go without qualification. Thus, in *Taylor v. California Stage Co.*,¹⁰³ the court, after calling attention to a conflict on the trial, said: "This view disposes of the second ground for new trial, viz., newly discovered evidence, as the same matter was in controversy on the trial, and there was a conflict of evidence." And in *People v. Wong Ah Foo*:¹⁰⁴ "The evidence was in the main cumulative, and, besides, those affidavits were contradicted in a material respect by that offered by the people." In *People v. Stanford*¹⁰⁵ the case turned mainly upon earmarks of a hog. The newly discovered evidence related entirely to the earmarks of the same hog, and was of course cumulative, or purely cumulative. Nevertheless, the court ordered a new trial, because it thought that to do otherwise would be "gross injustice," and, of course, saw a probability of a different result upon a retrial. In *Smith v. Grover*¹⁰⁶ the supreme court refused to reverse an order granting a new

¹⁰¹ See *Twin Springs Placer Co. v. Upper Boise Hydraulic Min. Co. (Idaho)*, 59 Pac. 535; *Georgia Southern etc. Ry. Co. v. Zarka*, 108 Ga. 800, 34 S. E. 127; *Layman v. Minneapolis St. Ry. Co.*, 66 Minn. 452, 69 N. W. 329.

¹⁰² See *Wright v. Carillo*, 22 Cal. 595, holding that where, upon the trial, the genuineness of a signature is put in issue and made the subject of proof, a new trial will not be granted on account of the discovery of new evidence tending to prove the signature a forgery. Before reaching this point the court had disposed of the case upon other points for reasons that rendered it improbable that the new evidence would have affected the result.

¹⁰³ 6 Cal. 228, 230.

¹⁰⁴ 69 Cal. 180, 10 Pac. 375.

¹⁰⁵ 64 Cal. 27, 29, 28 Pac. 106. See, also, *Lacewell v. State*, 95 Ga. 346, 22 S. E. 546; *Chumley v. State*, 28 Tex. App. 87, 12 S. W. 491.

¹⁰⁶ 74 Wis. 171, 42 N. W. 112.

trial on newly discovered evidence which was clearly cumulative, on the ground of its materiality and importance, stating that it would not be considered merely cumulative in the sense that would make it an abuse of discretion to set aside the verdict on that ground.

In some cases the courts, not content to sustain orders denying new trials, solely on the cumulative feature of the new evidence, have reinforced that reason by calling attention, in connection with it, to the lack of diligence.¹⁰⁷ And in a Washington case,¹⁰⁸ the court differentiated in these words: "But the prominent feature which takes it out of the reason of the rule of cumulative testimony is the fact that the witness required here is the only white witness in the case." All those who had previously testified were Indians.

Some courts have recognized exceptions to the rule, or decided that there are instances to which it does not apply, which is, to all intents and purposes the same as exceptions. That there were exceptions was admitted in an earlier California case.¹⁰⁹ In *State v. Stowe*,¹¹⁰ the court held that if the object of the evidence was to prove an alibi, the rule had no application. In an Iowa case,¹¹¹ it was held that the rule did not apply to evidence which was cumulative of the testimony on cross-examination of an adverse witness, incidentally favorable to the moving party. (It appears difficult to bring this case within either the rule of diligence, or the evidence within the definition, or within any proper exception to any rule on the subject.) And admissions of the adverse party, an important species of evidence, and a common instance of newly discovered evidence, and clearly within the definition of cumulative evidence, where any evidence at all has been introduced at the trial,

¹⁰⁷ See *Morse v. Swan*, 2 Mont. 306,

¹⁰⁸ *State v. Townsend*, 7 Wash. 462, 467, 35 Pac. 367.

¹⁰⁹ *Millard v. Hathaway*, 27 Cal. 147, 148, holding, however, that that case did not come within any of the exceptions.

¹¹⁰ 3 Wash. 206, 28 Pac. 337. See, also, *Dale v. State*, 88 Ga. 552, 15 S. E. 287, holding that newly discovered evidence to show mistaken identity by witness for prosecution cannot be said to be cumulative.

¹¹¹ *White v. Nafus*, 84 Iowa, 350, 51 N. W. 5.

has been held in several cases¹¹² not to be cumulative. In one case the court affirmed the order granting a new trial where the new evidence was weak and unsatisfactory, without making special mention of any reason for so deciding.¹¹³ In the fourth place, there is no more reason for any such discrimination where the ground is newly discovered evidence than where it is accident or surprise, and it has never been asserted that there was any such rule where the motion was based on the latter ground. It is well settled, as was previously shown,¹¹⁴ that the showing grounded on accident or surprise must present the probability of a different result, from the new evidence of which, the party was deprived by the surprise on retrial, and that, due diligence being shown, is the only requisite. If there were any reason for involving and beclouding the subject on a question of newly discovered evidence, with a doctrine or theory of cumulative or merely cumulative evidence, the same doctrine and theory should attach itself where the other ground is relied upon.

But lastly, and most important, is the recent attitude of the courts on this point as shown by their expressions in conformity with the views expressed here, and in the next preceding section. In several cases, and with unbroken uniformity in recent cases, the supreme court of California has taken care to qualify the rule against granting new trials on cumulative new evidence with a proviso equivalent to a strong assertion to the effect that if the probability of a different result upon retrial were present, the rule would not be operative.¹¹⁵ In the

¹¹² See *Adams Oil Co. v. Stout*, 19 Ky. Law Rep. 758, 41 S. W. 563; *Bullard v. Bullard*, 112 Iowa, 423, 84 N. W. 513; *Goldsworthy v. Linden (Town of)*, 75 Wis. 24, 43 N. W. 656; *Weber v. Weber*, 5 N. Y. Supp. 178.

¹¹³ *People v. Hong Quin Moon*, 92 Cal. 41, 27 Pac. 1096.

¹¹⁴ Ante, § 194.

¹¹⁵ See *Levitaky v. Johnson*, 85 Cal. 41, 43; *McCormick v. Central R. R. Co.*, 75 Cal. 506, 507, 17 Pac. 542; *Glahn v. Brennan*, 81 Cal. 261, 22 Pac. 596; *People v. Urquidas*, 96 Cal. 239, 242, 31 Pac. 52; *Howland v. Oakland Consol. St. Ry. Co.*, 110 Cal. 513, 517, 42 Pac. 983; *Shaffer v. Willis*, 124 Cal. 36, 41, 65 Pac. 635. To same effect *Louisville etc. Ry. Co. v. Crayton*, 69 Miss. 152, 12 South. 271; *Stephens v. State*, 99 Ga. 200, 24 S. E. 853. Where there is a doubt in the mind of the court as to the character of the new evidence, whether

most recent case involving the question,¹¹⁶ after quoting from the statute the requisites there prescribed, the court remarked: "Where these requisites occur they constitute sufficient grounds for new trial and no others can be required. Hence the rule, so often reiterated by the courts, that a new trial should not be granted where the evidence is merely cumulative, must be regarded (in this state) not as an independent rule, additional to those established by the provisions of section 657 of the code, but as a mere application of those rules." The courts of other states have gone much further in the same direction. In New York the question of whether the new evidence is cumulative is expressly and completely subordinated to the question, whether if admitted, it would probably produce a different result upon a retrial.¹¹⁷ And it was held that the fact that newly discovered evidence is cumulative is not necessarily an objection to granting a motion based thereon for a new trial, where the issue is close, and the evidence sharply conflicting.¹¹⁸ And in Kentucky, a view is taken which is the substantial equivalent of the New York rule. It is there held that where the new evidence goes to the foundation of plaintiff's claim, it cannot be considered as merely cumulative.¹¹⁹ The court in a Pennsylvania case,¹²⁰ gives clear expression of a safe rule for all cases, as

cumulative or otherwise, and there is a moral certainty that it would produce a verdict of acquittal, a new trial should be granted: *Cooper v. State*, 91 Ga. 362, 18 S. E. 303.

¹¹⁶ *Oberlander v. Fixen & Co.*, 129 Cal. 690, 62 Pac. 254. The court, continuing the quotation (page 692), said in substance that a new trial should not be refused merely because the evidence is cumulative, in a case where the cumulation is sufficiently strong to render a different result probable, citing its previous decisions.

¹¹⁷ *Kring v. New York etc. R. R. Co.*, 60 N. Y. Supp. 1114, 45 App. Div. 373; *Keister v. Rankin*, 54 N. Y. Supp. 274, 34 App. Div. 288. See, also, *German Nat. Bank v. Edwards*, 63 Neb. 604, 88 N. W. 657.

¹¹⁸ *Vollkommer v. Nassau Electric R. Co.*, 48 N. Y. Supp. 372, 23 App. Div. 88. To same effect, *Stackpole v. Perkins*, 85 Me. 298, 27 Atl. 160; *Winfield Building and Loan Assn. v. McMullen*, 59 Kan. 493, 53 Pac. 481.

¹¹⁹ *Berberich v. Louisville Bridge Co.*, 20 Ky. Law Rep. 467, 46 S. W. 691. See, also, *Duncan v. Allender*, 23 Ky. Law Rep. 256, 62 S. W. 851; *Mercer v. King*, 19 Ky. Law Rep. 781, 42 S. W. 108.

¹²⁰ *Loucks v. Lightner* (Pa. Com. P.), 11 York Leg. Rec. 157.

follows: If the new evidence is stronger and more direct upon the same vital point, than that produced at the trial, though of the same character, it would have a natural tendency to produce a different result, and would not be cumulative in the sense which justifies its exclusion. If, on the other hand the evidence already introduced be the stronger and more direct, and of the same character, then the new evidence would be cumulative without any probability of a different result.

It would appear that the question of whether the evidence be cumulative or not should have little or no force where the trial was before the court without a jury. And in a Massachusetts case,¹²¹ it was held that where the trial is by the court it has discretion to set aside its finding, and order a new trial, on a showing of newly discovered evidence, if of opinion that such evidence would materially change the finding, though the evidence is cumulative, and might have been discovered by due diligence. Upon all of which authorities and many more that might be cited, it is concluded that, all other objections to newly discovered evidence being absent, the fact that it is cumulative is unimportant; and, that it is not necessary for the intelligent and correct decision of a motion for a new trial in any case, where newly discovered evidence is relied on to consider its cumulative character, except in aid of a decision of the question, whether there is a probability of a different result upon a retrial.

§ 227. Must not be merely effective to impeach witnesses.

In the last two preceding sections the principles applicable to cumulative evidence, where the cumulative quality attaches to newly discovered evidence were discussed. The same principles may be said to apply in the main to newly discovered evidence which is, in the language of the courts, merely impeaching in its character; that is, evidence which has the effect of discrediting and contradicting witnesses who have testified at the trial. If the newly discovered evidence would establish a material fact of sufficient probative importance to render a different result probable on a retrial, the fact that it has the tendency or effect to contradict or impeach witnesses who have

¹²¹ *Keet v. Mason*, 167 Mass. 154, 45 N. E. 81.

testified on the trial should not prevent its full consideration on the motion, or the granting of a new trial to allow its introduction.¹²² The evidence should not on the motion be denied consideration under such conditions, any more than where evidence of equal importance is objected to as cumulative. The decisions involving impeaching, offered as newly discovered, evidence present about the same inconsistencies, inaptitudes of expression, conflicts, drift and tendency as on the subject of cumulative evidence so offered. The essence and ultimate result, however, supports the proposition above stated. It is in entire harmony with the general rule that newly discovered evidence which is merely impeaching in character is not ground for a new trial.¹²³ In a few cases orders granting new trials have been upheld without reference to the establishment of any new fact merely because the testimony given at the trial was

¹²² *People v. Stanford*, 64 Cal. 27, 28 Pac. 106, holding that, where opposite party prevents inquiry into a material question, and after the trial the movant for new trial ascertains facts with reference thereto so material as to render a different result probable on retrial, it is not a sufficient objection that the new evidence directly contradicts the principal witness for the successful opposite party. The materiality of the evidence was held sufficient to warrant a new trial, notwithstanding its contradictory tendency in *Langdon v. Kelly*, 51 Mo. App. 572; *State v. Moberly*, 121 Mo. 604, 26 S. W. 364; *Blackburn v. Crowder*, 110 Ind. 127, 10 N. E. 933; *Commonwealth v. Robins* (Pa. Quar. Sess.), 7 Kulp, 108; *Commonwealth v. Yat Sing* (Pa. O. & T.), 7 Kulp, 349; *Clark v. State*, 29 Tex. App. 437, 16 S. W. 171; *Dawson v. State*, 32 Tex. Cr. Rep. 535, 40 Am. St. Rep. 791, 25 S. W. 21; *Bailey v. State*, 36 Neb. 808, 55 N. W. 241; *Upington v. Keenan*, 67 Hun, 648, 21 N. Y. Supp. 699; *Keister v. Rankin*, 54 N. Y. Supp. 274, 34 App. Div. 288.

¹²³ *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40; *Kloekenbaum v. Pierson*, 22 Cal. 160; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *Stokes v. Monroe*, 36 Cal. 383; *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207; *People v. Anthony*, 56 Cal. 397; *People v. Ah Noon*, 116 Cal. 656, 48 Pac. 799; *Christ v. People*, 3 Colo. 394; *Fist v. Fist*, 3 Colo. App. 273, 32 Pac. 719; *Mackey v. Mackey*, 16 Colo. 134, 26 Pac. 554; *State v. Anderson*, 14 Mont. 541, 37 Pac. 1; *Baxter v. Hamilton*, 20 Mont. 327, 51 Pac. 265; *State v. Gardner*, 33 Or. 150, 54 Pac. 809; *Territory v. Latshaw*, 1 Or. 146; *State v. Hunter*, 18 Wash. 670, 52 Pac. 247; *Robinson v. Veal*, 79 Ga. 633, 7 S. E. 159; *Brown v. Grove* (Ind.), 18 N. E. 387; *Lee v. Birmingham*, 39 Kan. 320, 18 Pac. 218; *Morgan v. Bell*, 41 Kan. 345, 21 Pac. 255; *Cirkel v. Gros-*

strongly, or overwhelmingly contradicted by that contained in the affidavits.¹²⁴

§ 228. No objection to corroborative evidence as such.

Whatever view may be taken of an objection to newly discovered evidence with reference to its cumulative character, no objection can be urged to it on the ground that it is corroborative. Evidence of a different kind and character from that produced at the trial, though bearing on the same points is corroborative, and if there be no other objection to it, warrants a new trial.¹²⁵ Whether evidence be corroborative or merely cumulative, within the meaning given the latter term by the courts and codes, is to be determined from its kind, rather than from its effect.¹²⁶

§ 229. Affidavits of party and counsel.

Great care is required in the preparation of affidavits to be used on the motion. Almost the entire showing on the motion consists in that made by affidavits. The affidavit of the moving party and also that of his attorney, or of one of his attorneys, where there are more than one, are usually required to fix the character of the evidence as newly discovered, as well as to show diligence. On other essentials of the showing the affidavit of either will suffice, but in view of the practice in many courts of permitting counter-affidavits to be presented, the

well, 36 Minn. 323, 31 N. W. 513; *Sly v. Union Depot Co.*, 134 Mo. 681, 36 S. W. 235; *Besse v. Sawyer*, 28 Ill. App. 248; *Hooker v. Chicago etc. R. Co.*, 76 Wis. 542, 44 N. W. 1085; *State v. Smith*, 35 Kan. 618, 11 Pac. 908; *Husted v. Mead*, 58 Conn. 55, 19 Atl. 233.

¹²⁴ See *O'Bryan v. Bowers* (Pa. Com. P.), 10 Pa. Co. Ct. 254; *White v. Nafus*, 84 Iowa, 350, 51 N. W. 5; *Dort v. Kudlick*, 59 Hun, 622, 13 N. Y. Supp. 61; *Phillips v. State*, 35 Tex. Cr. App. 372, 34 S. W. 272; *Potts v. State*, 26 Tex. App. 663, 14 S. W. 456; *Owens v. State*, 35 Tex. Cr. App. 345, 33 S. W. 875.

¹²⁵ *Corkery v. Central R. R. of New Jersey* (N. J.), 43 Atl. 655. See, also, *Bulkin v. Ehret*, 20 N. Y. Supp. 731, 29 Abb. N. C. 62.

¹²⁶ *Winfield Building etc. Assn. v. McMullen*, 59 Kan. 493, 53 Pac. 481. It would appear that evidence corroborative of defendant in a criminal case is not merely cumulative; else there is such thing as a newly discovered witness, distinct from newly discovered evidence in Indiana: *Morse v. State*, 108 Ind. 599, 9 N. E. 455.

movant is more likely to err on the side of too few than too many affidavits, covering all matters required to be shown; for a new trial will not be granted on the ground of newly discovered evidence, if the affidavit on which it is claimed is shown, by counter-affidavits, to be exposed to the suspicion of bad faith.¹²⁷ The order in which these are set forth is not vitally material, but the skillful practitioner will take pride in an orderly arrangement, and thereby render a favorable impression, on the mind of the court, more likely. Attention will first be given to the affidavit of the moving party, following the most natural order as to its various parts.

1. It should set forth the new evidence and names of witnesses, or source of the evidence if it be other than oral testimony. In this part not only should the names of the witnesses be given, and the particular facts which they are expected to prove,¹²⁸ but the ground of such expectation should also be set forth.¹²⁹ The newly discovered evidence should be fully set forth;¹³⁰ and the affidavit of counsel based upon information and belief, of what the witness will testify to is insufficient to secure a new trial.¹³¹ The affidavit should state as specifically as practicable the nature of such evidence, and not merely its legal effect.¹³²

2. Affidavit should show diligence in discovering evidence and procuring attendance of witnesses at the trial. It was thought best to discuss the requisites of affidavits in the sections devoted

¹²⁷ *Merk v. Gelzhausen*, 50 Cal. 631.

¹²⁸ *Arnold v. Skaggs*, 35 Cal. 684; *McLeod v. Shelby Mfg. etc. Co.*, 108 Ala. 81, 19 South. 326.

¹²⁹ *Fitch v. Siedlinger*, 96 Me. 70, 51 Atl. 241; *Arnold v. Skaggs*, 35 Cal. 684.

¹³⁰ *Perry v. Cochran*, 1 Cal. 180.

¹³¹ *Cole v. Thornburg*, 4 Colo. App. 95, 34 Pac. 1013; *Holland v. Huston*, 20 Mont. 84, 49 Pac. 390.

¹³² *German Ins. Co. v. Frederick*, 57 Neb. 538, 77 N. W. 1106. See *Case v. Coddington*, 38 Cal. 191, 194, where one of the grounds for affirming the order denying a new trial was that the movant had failed to set out a memorandum by which he expected to convince one of his witnesses that he was mistaken in his testimony.

to the subject of diligence herein, to which reference is here made.¹³³

3. The probability of securing the attendance of the absent witness, or of producing the new evidence, must be made to appear, especially if other portions of the affidavit tend to create a doubt on the subject.¹³⁴

§ 230. Affidavits of witnesses.

The rule, and its qualification, with reference to the presentation on the motion of the affidavits of witnesses, was thus stated in *Arnold v. Skaggs*:¹³⁵ "In asking for a new trial on the ground of newly discovered evidence, it is not sufficient for the moving party to state in his affidavit what, as he has learned, certain persons know about the matter, and how, as he believes, they will testify. He must produce the affidavits of the newly discovered witnesses as to what they know, and as to what they will testify. The affidavit of the party himself is but hearsay testimony, and cannot be received, unless, for good cause shown, the affidavit of the newly discovered witnesses cannot be obtained in time, or in such further time as may have been granted for that purpose." As stated in the above quotation, the true reason for requiring the affidavits of the witnesses is that the statement of the party as to the evidence they will give is but hearsay.¹³⁶ The Penal Code of Cali-

¹³³ See essentials of this ground as set forth in preceding sections of this chapter.

¹³⁴ *Arnold v. Skaggs*, 35 Cal. 684; *Fitch v. Siedlinger*, 96 Me. 70, 51 Atl. 241. For an affidavit defective in several respects see *State v. Miller*, 3 Wash. 131, 28 Pac. 375. Held sufficient showing of diligence. Where the affidavits made it appear that preparatory for the trial diligent search had been made in vain for a paper material in the case in an auditor's department of a corporation, where the law required it to be kept, and that after the trial it had been discovered in a janitor's room, formerly used as the auditor's department: *Grotte v. Schmidt*, 80 Iowa, 454, 45 N. W. 771.

¹³⁵ 35 Cal. 684, 687. See, also, *Jenny Lind Co. v. Bowers*, 11 Cal. 194; *People v. De Lacy*, 28 Cal. 590; *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *State v. Shafer*, 56 Mo. App. 496; *McVey v. State*, 23 Tex. App. 174, 5 S. W. 174.

¹³⁶ See *Holland v. Huston*, 20 Mont. 84, 49 Pac. 390.

fornia¹³⁷ now requires the affidavits of the proposed witnesses to accompany the application, and no excuse for not producing them, in criminal cases, will be considered. And in civil cases a very strong showing will usually be required in order to excuse their absence.¹³⁸ No standard has been specifically prescribed by any decision. Probably the same degree of diligence to procure the affidavit of the witness as to obtain the attendance of a witness at the trial, in order to entitle a party to a continuance, would suffice. From the nature of the case, no suggestions of any practical value can be made as to the form and contents of the affidavits of the proposed witnesses. They should not, however, omit to state, among other matters, the personal knowledge of the affiants of the facts therein set forth, or that they will testify to them.¹³⁹

If the newly discovered evidence consists in lost papers, found since the trial, the affidavits must prove the genuineness thereof and also show their legal validity or sufficiency. In *Smithers v. Fitch*¹⁴⁰ the court well illustrates this requirement in the following language: "Certain affidavits were read on the motion for a new trial, by which it was intended to show that a petition for the road had been filed and notice had been given, and that they (on the trial shown to be lost papers) had been found. The defendants, in their brief, say that they attach importance to the petition only for the purpose of showing that William Markwood was the person owning the land at that time, had signed it, and therefore must be held, under section 2 of the act of 1861, *supra*, to have dedicated the land. But the affidavit does not pretend to declare that the affiant knows as a fact that Markwood signed the petition, or that the signature purporting to be his is in his handwriting. There is no proof whether the name appended to the petition is the real or fictitious signature of Markwood. There is nothing shown by the affidavit, or the petition attached as being found among the records of the county, that the route that the road was to take, if established, was over any of Markwood's land."

¹³⁷ § 1181.

¹³⁸ *State v. Nettles*, 153 Mo. 464, 55 S. W. 70.

¹³⁹ *Hecla Powder Co. v. Signa Iron Co.*, 37 N. Y. Supp. 149, 1 App. Div. 371. To same effect, *State v. Hyde*, 22 Wash. 551, 61 Pac. 719.

¹⁴⁰ 82 Cal. 153, 158, 22 Pac. 935.

CHAPTER 12.

EXCESSIVE DAMAGES.

- § 231. General principles.
- § 232. Where evidence as to amount of damages is conflicting.
- § 233. Rule applicable to excessive damages in recoupment.
- § 234. Where standard of calculation imperfect or only partially available.
- § 235. Verdict not set aside for slight excess.

§ 231. General principles.

In the cases here to be considered, the ground upon which a new trial may be granted, if at all, is not, properly speaking, the amount at which the damages are placed in the verdict, but the passion or prejudice which prompted the verdict. The figures representing the damages awarded, though important, are by no means the only matter to be considered upon the motion. Necessarily, all the prominent features of the case must be taken into consideration in passing upon the question whether the verdict was reached as the result of deliberate calculation and weighing of facts, conditions, relations and circumstances on the one hand, or of impulse, passion or prejudice on the other. In *Doolin v. Omnibus Cable Co.*¹ it was said:

¹ 125 Cal. 141, 57 Pac. 774. In *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 157, 162, 47 Pac. 1019, the court said: "Whether the verdict is excessive is to be determined solely from a consideration of the evidence in the case, and whether it will fairly sustain the conclusion of the jury—a question which cannot be aided by the showing of extrinsic facts, by affidavits, or otherwise." But this was carrying the point too far. The amount found must, of course, be also considered. It was said in *Connors v. Chingren*, 111 Iowa, 437, 82 N. W. 934, that when the amount of the recovery is not limited by the instructions, it cannot be said, from the size of the verdict alone, that it is the result of passion or prejudice. It would seem that the period of the jury's deliberation, whether long or brief, is not any criterion for the determination of the question whether they

"The only means of discovering the element of 'passion or prejudice' within the meaning of the statute is by comparing the amount with the evidence before the court at the trial; and that expression is but one mode of saying that the evidence is insufficient to justify the verdict for excessive damages." In an earlier case it was positively held that in case of either excessive damages, or of damages in an inadequate amount, the complaining party could also rely upon the insufficiency of the evidence.² The true rule, applicable to all cases where damages are not computable by any known standard, was thus stated in an action for damages resulting from negligence (after citing from authorities): "These cases hold that in actions of this character the law does not attempt to fix any precise rules for ascertaining what is just compensation, but from the necessity of the case leaves the assessment of the damages to the good sense and unbiased judgment of the jury, whose province it is to make the assessment; that while the verdict in these cases, as in all others, is subject to review by the court, it will not be disturbed merely upon the ground that the damages are excessive, nor because the opinion of the court differs from that of the jury, but only where it appears that the excess has been given under the influence of passion or prejudice."³ A some-

were influenced by passion or prejudice; and in an action by a minor against a railway company for personal injuries, the fact that the jury, after being out only ten minutes, returned a verdict for \$10,000, was held not to show that it was the result of passion or prejudice: *Pittsburg etc. Ry. Co. v. Geltmaker*, 16 Ky. Law Rep. 861, 30 S. W. 394. In an action for personal injuries sustained in a street-car collision, where it appeared that plaintiff was thrown from a car, striking her head and side, sustaining injuries and displacement of the uterus and other internal organs, but that, while severely shocked, the nervousness brought about thereby was curable, and that, while the uterine and other difficulties were painful, they were less troublesome than just after the accident, and were probably curable, it was held that a verdict for \$20,000 was excessive, and should be reduced to \$7,500, or a new trial granted: *Hamilton v. Great Falls St. Ry. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

² *De Brutz v. Jessup*, 54 Cal. 118.

³ *Lee v. Southern Pacific Co.*, 101 Cal. 118, 121, 53 Pac. 572. To same effect, *Mize v. Hearst*, 130 Cal. 630, 63 Pac. 30; *Morgan v. Southern Pacific Co.*, 95 Cal. 501, 30 Pac. 601; *Aldrich v. Palmer*, 24

what more elaborate statement of the true principle governing herein is found in the opinion by Chief Justice Sanderson, in *Aldrich v. Palmer*,⁴ as follows: "In actions for personal torts the law does not attempt to fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury. Their verdict, as in all other cases, is subject to review by the court, but it will never be disturbed unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate consideration of the jury. The leading object of such action is to obtain reasonable and just compensation for the injury sustained, comprehending both the present and the future. But to ascertain what is a fair and just compensation in such cases is a judicial problem of difficult, if not impossible, solution. None, however, are more competent to its proper solution than the jury. Hence, the courts have always sparingly exercised the power of granting new trials in such cases. Where the law furnishes no rule for the measurement of damages, their assessment is peculiarly the province of the jury, and the court will never in-

Cal. 513; *Wheaton v. North Beach etc. R. R. Co.*, 36 Cal. 590; *Gorman v. Southern Pacific Co.*, 97 Cal. 1, 33 Am. St. Rep. 157, 31 Pac. 1112; *Myers v. San Francisco*, 42 Cal. 215; *Sherwood v. Kyle*, 125 Cal. 652, 58 Pac. 270; *Meeks v. St. Paul (City of)*, 64 Minn. 220, 66 N. W. 966. For a case in which it was not shown that the damages found were excessive, or that they were given under the influence of passion or prejudice, see *Wilson v. Southern Pacific R. R. Co.*, 62 Cal. 164. Verdict for damages in excess of amount asked for in the complaint will be set aside: *Garlick v. Bower*, 62 Cal. 65; *Vandeford v. Foster*, 62 Cal. 179. Instance where it is said the verdict is so manifestly against the weight of the evidence as to indicate that the jury were controlled by some improper motive in making their findings: *Denver Tramway Co. v. Lassasso*, 22 Colo. 444, 449, 45 Pac. 409. Verdict in a trover case for \$8,138.33, held excessive upon the facts: *First Nat. Bank of Colorado Springs v. Wilbur*, 16 Colo. 316, 322, 26 Pac. 777. That a verdict which is excessive should be set aside, see *Union Pac. etc. R. Co. v. Perkins*, 7 Colo. App. 184, 189, 42 Pac. 1047. That a judgment cannot stand if too large, see *Denver etc. R. R. Co. v. Neis*, 10 Colo. 56, 59, 14 Pac. 105; *Buenz v. Cook*, 15 Colo. 38-43, 24 Pac. 679.

⁴ 24 Cal. 513, 516.

terfere with their verdict merely on the ground of excess. Upon such a question the court has no right to substitute its opinion for that of the jury, merely because it happens to differ from theirs." Inasmuch as the damages, in the absence of any recognized standard, must be ascertained and fixed according to varying opinions of jurors, and are necessarily the subject of speculation rather than of calculation, no more definite legal rule, of any practical value, has ever been promulgated than the foregoing. Less latitude of discretion is conceded to trial judges by federal, and a few state, courts of review than that shown in the foregoing views—or it may be said, with equal propriety, more respect is there paid to opinions of the jury; and it is held that a verdict should be set aside as excessive only when the excess is shocking to a sound judgment and a sense of fairness to the defendant; that, where there is any margin for a reasonable difference of opinion in the matter, the view of the court should yield to the verdict of the jury, rather than the contrary.⁵ The same principle was asserted by the supreme court of California in an action for damages for slander, where express malice was shown;⁶ also in a case of malicious trespass.⁷ There is no discernible difference between the view taken on this subject in federal courts and that of the supreme court of California. In *Harris v. Zanone*⁸ the court said: "The record does not disclose anything from which it can be said that the damages awarded by the jury appear to have been given under the influence of passion or prejudice. It is very difficult to determine the proper amount of damages in an action of this character, and the law has wisely left it to the just discretion of the jury, and has also given to them the right, upon proof that the defendant was guilty of malice, to give damages for the sake of example, and by way of punishing the defendant. There can be no measure of compensation for the wrong done to a plaintiff by charging her with a crime, except the judgment of an impar-

⁵ *Smith v. Pittsburg etc. R. Co.* (U. S. C. C.), 90 Fed. 783. See also, *McGowan v. La Plata Min. etc. Co.*, 3 McCrary, 393, 9 Fed. 861.

⁶ *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845.

⁷ *Russell v. Dennison*, 45 Cal. 337.

⁸ 93 Cal. 59, 71, 28 Pac. 845.

tial jury. Under the evidence before it, the jury must have found that the defendant was guilty of malice in the utterance of the words charged; and it cannot be said that the amount awarded is so great as to 'shock the moral sense.' And in an earlier case the same court said: "The court will not interfere in such cases, unless the amount awarded is so grossly excessive as to shock the moral sense and raise a reasonable presumption that the jury was under the influence of passion or prejudice. In this case, whilst the sum awarded appears to be much larger than the facts demanded, the amount cannot be said to be so grossly excessive as to be reasonably imputed only to passion or prejudice in the jury. In such cases there is no accurate standard by which to compute the injury, and the jury must necessarily be left to the exercise of a wide discretion, to be restricted by the court only when the sum awarded is so large that the verdict shocks the moral sense and raises a presumption that it must have proceeded from passion or prejudice."⁹ But where passion or prejudice do appear from the record, it is as much the duty of the court to grant a new trial as where any other ground is shown.¹⁰

The supreme court of Minnesota is guided by the rule that, in order to justify the granting of a new trial, the damages must be so excessive as to shock the sense of justice and satisfy the court that, after making just allowance for the difference of opinion among fair-minded men, the amount cannot be accounted for except on the theory of passion or prejudice.¹¹

It is the purpose of the provision allowing a new trial on the ground of passion and prejudice resulting in excessive verdicts, to place a wholesome check upon the passion and prejudice of the jury in all cases of unliquidable or discretionary damages; and an excessive verdict may be set aside, even in a case where exemplary damages are recoverable.¹²

§ 232. Where evidence as to amount of damage is conflicting.

Since the court alone passes upon the question whether

⁹ *Wilson v. Fitch*, 41 Cal. 386.

¹⁰ *Lee v. Southern Pac. Co.*, 101 Cal. 118, 35 Pac. 572.

¹¹ *Blume v. Scheer*, 83 Minn. 409, 86 N. W. 446.

¹² *Tynberg v. Cohen*, 76 Tex. 409, 13 S. W. 315. See, also, *Barry v. Pennsylvania R. Co.*, 65 N. J. L. 407, 47 Atl. 464.

passion or prejudice entered into the result reached by the jury, it would appear that in its incidental examination of the evidence, it is immaterial whether it were uncontradicted and consistent, or conflicting and inconsistent, as affecting the power and duty of the court herein. In *Harrison v. Sutter Street Ry. Co.*¹³ the court, after adverting to the contention of counsel that the verdict should not be disturbed because the evidence as to the injuries to plaintiff was conflicting, said: "A jury, if excited by prejudice, might as readily award unjust damages where the evidence was uncontradicted as where it was in sharp conflict." In that case the lower court had set the verdict aside and awarded a new trial. As regards courts of review, no examination will be made of the evidence if conflicting on the question of damages, unless the amount awarded is, on its face, excessive, after giving due weight to all the evidence in its support shown by the record. Accordingly, where, in an action for damages for the depreciation in value of property, occasioned by the construction and operation of a railway in the street on which the property abuts, where there was a conflict in the evidence as to the depreciation of the property, part of the witnesses placing it as greater than that found by the jury, and the jury having viewed the premises, it was held that the verdict should not be set aside as excessive.¹⁴ But, if upon giving the most favorable consideration to all the evidence the amount still appears palpably excessive, a new trial will be ordered by the appellate court, though denied by the trial court.¹⁵ And where the evidence of medical experts was conflicting as to the extent and permanency of the plaintiff's injury, and there being evidence tending to show that the injury was less serious than the plaintiff contended, it was held that, under the circumstances attending the case, a verdict in plaintiff's favor for thirty thousand dollars damages was excessive, and the defendant was entitled to a new trial upon

¹³ 116 Cal. 156, 162, 47 Pac. 1019.

¹⁴ *Denver etc. Ry. Co. v. Bourne*, 11 Colo. 59, 64, 16 Pac. 839.

¹⁵ *Tilden v. Gordon*, 25 Wash. 593, 596, 66 Pac. 50. This was not a case of excessive damages, and is cited here merely as illustrative of a principle applicable to the subject under consideration.

that ground.¹⁶ On the other hand, it was held no reason for holding the amount of damages excessive as ground for new trial when the sum allowed was less than that claimed in the complaint, and the uncontradicted evidence of plaintiff showed that he suffered twice as much damage as that claimed.¹⁷

§ 233. Rule applicable to excessive damages in recoupment.

The ground for new trial on account of excessiveness of the verdict applies as well when the verdict is in favor of defendant, on a plea of recoupment, as when the excessive verdict is in favor of plaintiff.¹⁸

§ 234. Where standard of calculation imperfect, or only partially available.

Where the action is for damages of a mixed character, being in part computable upon a fixed standard, and partly speculative, and the verdict is not so excessive as to clearly indicate passion or prejudice in awarding the latter, and is in keeping with the instructions and evidence as to the former, it will not be disturbed.¹⁹ But where it was clear on the facts that it was not a case where the jury could legally award exemplary damages, and it was obvious from their verdict that it must have included exemplary damages, it was held to be the duty of the court, on motion, to set aside such verdict and award a new trial.²⁰

§ 235. Verdict not set aside for slight excess.

The verdict will not, when based upon this, any more than when based upon any other, ground, be set aside, unless the

¹⁶ *Fisher v. Southern Pacific R. R. Co.*, 89 Cal. 399, 26 Pac. 894. Case decided on errors. Excess only mentioned in concurring opinion of De Haven. A verdict in favor of one defendant and against another, based upon conflicting evidence, which is the same as to both defendants, cannot be permitted to stand as to either: *Gerner v. Yates*, 61 Neb. 100, 84 N. W. 596.

¹⁷ *Pereira v. Smith*, 79 Cal. 232, 21 Pac. 739.

¹⁸ *Levens v. Smith*, 102 Ga. 480, 31 S. E. 104.

¹⁹ *Edwards v. Southern Ry. Co.* (U. S. C. C.), 102 Fed. 720.

²⁰ *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485.

resulting injury from a refusal would be substantial in legal sense. And a verdict for fifty dollars, though properly regarded as substantial damages, was held so small in amount that a new trial should not be granted for its reduction.²¹

²¹ *Watson v. New Milford (Town of)*, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167.

CHAPTER 13.

INSUFFICIENCY OF EVIDENCE AND VERDICT OR DECISION AGAINST LAW.

I. INSUFFICIENCY OF EVIDENCE.

II. VERDICT OR OTHER DECISION AGAINST LAW.

I. INSUFFICIENCY OF EVIDENCE.

- § 236. Meaning of terms used in statute.
- § 237. Province of trial courts seldom invaded.
- § 238. The varied expressions of the courts.
- § 239. In criminal cases.
- § 240. Different remedies for insufficiency of evidence.
- § 241. Verdict should be set aside when evidence fails to prove any material facts.
- § 242. Same rule applied in cases of special findings by jury.
- § 243. Disbelief of evidence.
- § 244. Theory upon which trial conducted sometimes important.
- § 245. Same—Verdict for aggregate sum—More than one count, only one supported.
- § 246. Application of rules to particular actions.
- § 247. In damage cases.
- § 248. Same principle applicable in special proceedings as in actions.
- § 249. No relief without substantial prejudice.

II. VERDICT, OR OTHER DECISION AGAINST LAW.

- § 250. Decision against law as a distinct ground for new trial.
- § 251. Same—Failure to follow instructions.
- § 252. Why insufficiency of evidence and “against law” placed in same subdivision.
- § 253. Failure to find on material issues.
- § 254. Verdicts against law.

I. INSUFFICIENCY OF EVIDENCE.

§ 236. Meaning of terms used in statute.

Subdivision 6 of section 657 of the California Code of Civil Procedure reads thus: "6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law. Subdivision 6 of section 1181 of the Penal Code of California reads thus: "6. When the verdict is contrary to law or evidence."

As regards the question of evidence, these provisions do not appear to convey exactly the same meaning. Under the provision in the Code of Civil Procedure that a verdict or other decision may be set aside as not supported by sufficient evidence, it requires a liberal construction to justify the court in setting it aside merely because, in the opinion of the court, the weight of the evidence is against it. A verdict may find support in the evidence, though contrary to its weight. If there is substantial evidence in support of the verdict or decision, it is supported thereby, though there be more or weightier evidence against it. On the other hand, a verdict in a criminal case is "contrary to the evidence" when contrary to the weight of all the evidence. The statute evidently does not mean that the verdict may be set aside if merely opposed by some of the evidence. And yet, in practice, no such distinction between the respective provisions of the Code of Civil Procedure and the Penal Code, as is here pointed out, has ever been made by the courts.

§ 237. Province of trial courts seldom invaded.

It is settled by overwhelming authority, in nearly all the states, that trial courts may exercise a discretion in setting aside verdicts, and other decisions which in their opinion are opposed to the weight of evidence. In each of a large majority of the states will be found a line of decisions in which this proposition is recognized.¹ Various phraseology has been em-

¹ See *Dickey v. Davis*, 39 Cal. 565; *Sherman v. Mitchell*, 46 Cal. 579; *Gerold v. Brunswick & Balke Co.*, 67 Cal. 124, 7 Pac. 306; *Curtiss v. Starr*, 85 Cal. 377, 24 Pac. 806; *Byorman v. Ft. Bragg etc. Co.*, 92 Cal. 501, 28 Pac. 591; *Domico v. Cassassa*, 101 Cal. 414, 35 Pac.

ployed by judges in expression of the doctrine. Courts have sometimes attempted to approximate exactitude, some were vague and halting, and a few were misleading. But from the nature of the case none of them were or could be exact, or of

1024; *Mills v. Oregon etc. Co.*, 102 Cal. 359, 36 Pac. 772; *In re Carriger*, 104 Cal. 81, 83, 37 Pac. 785; *Bates v. Howard*, 105 Cal. 179, 38 Pac. 715; *McCauley v. Tyler*, 11 Mont. 52, 27 Pac. 391; *Rosina v. Trowbridge*, 20 Nev. 121, 17 Pac. 751; *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 319, 47 Pac. 738; *Snyder v. Parker*, 19 Wash. 276, 67 Am. St. Rep. 726, 53 Pac. 59; *Holgate v. Parker*, 18 Wash. 206, 51 Pac. 368; *Friedman v. Manley*, 21 Wash. 43, 56 Pac. 832; *Welch v. Abbott*, 72 Wis. 512, 40 N. W. 223; *Murray v. Heinz*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; *Chanvin v. Valiton*, 7 Mont. 581, 19 Pac. 215; *Beckshead v. Montana Union Ry. Co.*, 19 Mont. 147, 47 Pac. 795; *Meinhard v. Mullin*, 80 Ga. 593, 5 S. E. 792. Other California cases are: *Pacific Rolling Mill Co. v. Telegraph Hill R. R. Co.*, 79 Cal. 340, 21 Pac. 840; *Haas v. Whittier (Cal.)*, 21 Pac. 547; *Bledsoe v. Decrow*, 132 Cal. 312, 64 Pac. 397; *Brooks v. San Francisco etc. Ry. Co.*, 110 Cal. 173, 42 Pac. 570; *Cole v. Wilcox*, 99 Cal. 549, 34 Pac. 114. That where trial judge grants a new trial on the ground that the verdict is against the weight of the evidence, his order will not be disturbed, unless it appeared clearly that the jury erred. See, also, *Orr v. Haskell*, 2 Mont. 225; *Boe v. Lynch*, 20 Mont. 80, 49 Pac. 381; *Butte etc. Min. Co. v. Societe Anonyme etc.*, 23 Mont. 177, 75 Am. St. Rep. 505, 58 Pac. 111; *Mattock v. Gaughnour*, 11 Mont. 274, 28 Pac. 301; *McIntire v. McCabe*, 19 Mont. 333, 48 Pac. 390; *Haggin v. Saile*, 14 Mont. 79, 35 Pac. 514; *Hamilton v. Nelson*, 22 Mont. 539, 57 Pac. 146; *O'Rourke v. Sherman*, 23 Mont. 310, 58 Pac. 810; *Edward v. Carson Water Co.*, 21 Nev. 469, 34 Pac. 381; *Rinehart v. Watson*, 11 Wash. 526, 40 Pac. 127; *State v. Symes*, 17 Wash. 598, 50 Pac. 487; *Spokane v. Amsterdamsch Trustees Kantoor*, 18 Wash. 80, 50 Pac. 1088; *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907; *McBroom and Wilson Co. v. Gandy*, 18 Wash. 79, 50 Pac. 572; *Corbitt v. Harrington*, 14 Wash. 197, 44 Pac. 132; *O'Rourke v. Jones*, 22 Wash. 629, 61 Pac. 709; *Bank of Chadron v. Anderson*, 7 Wyo. 441, 53 Pac. 280.

As early as the year 1863, the supreme court of California, in *Quinn v. Kenyon*, 22 Cal. 82, said: "It is only in rare instances, and upon very strong grounds, that this court will set aside an order granting a new trial." In *Curtiss v. Starr*, *supra*, it was said that "the rule as to conflict of evidence does not apply in the trial court." In *McCauley v. Tyler*, *supra*, the court said: "It is maintained by the appellants that the findings of facts from the testimony is like the verdict of a jury, and must stand if there is evidence to support it. Although the verdict and finding are upon the same footing for this pur-

any considerable value in future cases. In *Estate of Carriger*,² McFarland, J., delivering the opinion, said: "When the judge of a trial court is satisfied that a verdict is not warranted by the evidence he should set it aside; and when he does so his order granting a new trial will not be reversed unless it appears to this court that he had no reasonable and just ground for holding that the verdict was against the weight of the evidence. The mere fact that there is some conflicting evidence on the points at issue does not preclude him from exercising the supervisory power of granting a new trial which is clearly given him. This court will, of course, reverse orders denying or granting new trials in extreme cases. No absolute rule of universal ap-

pose, this rule does not apply to the judge of the court below." To same effect, *Dickey v. Davis*, 39 Cal. 565; *Sherman v. Mitchell*, 46 Cal. 576. In *Hamilton v. Nelson*, supra, the court said: "Whether or not a new trial should be granted for the reason that the verdict is against the weight of the evidence is a question peculiarly within the sound legal discretion of the trial judge, who has the advantage of seeing the witnesses, of hearing their testimony orally delivered, and of observing their demeanor and conduct upon the stand; hence the exercise of such discretion will not be disturbed by this court." To same effect, *O'Rourke v. Sherman*, 23 Mont. 310, 58 Pac. 810. In *Rotting v. Coleman*, 12 Wash. 615, 41 Pac. 907, the court said: "On appeal, the orders of the trial court, in granting or refusing new trials, will not be disturbed where the record shows a substantial conflict in the testimony." Cited and followed in *McBroom v. Gandy*, 18 Wash. 79, 80, 50 Pac. 572. The Ohio statute is substantially the same as those of the other states from which the above cases are cited; and it is there held that the court, by force thereof, may grant a new trial where the verdict is against or contrary to the weight of the evidence": *Weaver v. Columbus etc. Ry. Co.*, 55 Ohio St. 491, 45 N. E. 717. In *Serles v. Serles*, 35 Or. 289, 296, 57 Pac. 634, the court said: "There may be sufficient evidence to go to the jury to make a prima facie case, yet there may be opposing evidence so strong, palpable, and overwhelming as to dissipate any reasonable idea that the prima facie case should prevail; or the case as first made may be so strong, and the countervailing testimony so weak and unsatisfactory, as to preclude an honest and rational judgment against the case first made. In either case, if the jury should disregard the better showing, it would plainly be the duty of the court to interpose, upon motion for a new trial, and set the verdict aside; and this is the rationale of the statute, in providing that the verdict may be set aside for insufficiency of evidence."

² 104 Cal. 81, 83, 37 Pac. 785.

plication can be formulated. This court has approximated such a rule as nearly as may be by saying that a motion for a new trial is addressed to the sound legal discretion of the trial judge, and that an order granting or refusing it will not be disturbed unless it appears that there has been a manifest abuse of discretion. Such language has been used by nearly every justice who has sat on this bench, and it is not open to just adverse criticism."

In criminal cases a still more absolute control of the matter of granting or refusing new trials appears to have been conceded to trial courts. In *People v. Knutte*,³ the defendant had been tried for the offense of obtaining money under false pretenses. At the close of the evidence for the prosecution, the court instructed the jury to return a verdict of not guilty. Nevertheless, the jury returned a verdict of guilty, which the court immediately set aside, granting defendant a new trial. From that order the people appealed. The point at issue on appeal was conceded by both sides to be whether the verdict was contrary to, or was supported by, the evidence. The court in affirming the order said: "While it is the exclusive province of the jury to find the facts, it is nevertheless one of the most important requirements of the trial judge to see to it that this function of the jury is intelligently and justly exercised. In this respect, while he cannot competently interfere with or control the jury in passing upon the evidence, he nevertheless exercises a very salutary supervisory power over their verdict. In the exercise of that power he should always satisfy himself that the evidence as a whole is sufficient to sustain the verdict found, and, if in his sound judgment it is not, he should unhesitatingly say so, and set the verdict aside. It can, of course, make no difference in the exercise of this power by the court that the evidence in the case was wholly that of the prosecution, and stands, in the sense at least that it is not controverted by evidence on behalf of defendant, without conflict. The same duty rests upon the judge in such a case as where the evidence is con-

³ 111 Cal. 453, 455, 44 Pac. 166. See, also, *People v. Flood*, 102 Cal. 333, 36 Pac. 663; *People v. Lum Yit*, 83 Cal. 130, 23 Pac. 228; *People v. Chew Wing Gow*, 120 Cal. 299, 52 Pac. 657; *People v. Hatz*, 73 Cal. 241, 14 Pac. 856; *People v. Ashnauer*, 47 Cal. 98; *People v. Baker*, 39 Cal. 686.

flicting, to satisfy himself that guilt has been established; and notwithstanding the evidence may be all one way, he is not required to believe it." And in *People v. Chew Wing Gow*,⁴ the language of the court, per Temple, J., was, if possible, even stronger, as follows: "It is claimed by the attorney general that the judge in granting a new trial abused the discretion reposed in him by the law. It is made his duty to grant a new trial if in his opinion the verdict is against the evidence. This is one of the most important duties which the trial judge has to perform, and, no efficient review of his action can be had. It is peculiarly incumbent upon the judge to weigh the evidence with care, and grant a new trial when, in his opinion, the interests of justice require it. In my opinion, there is no more prolific cause of the miscarriage of justice than the reluctance of trial judges to grant new trials in criminal cases. This court can review the evidence only so far as it is necessary to pass upon points of law raised; and, although there are cases in which it is assumed that the court will, on appeal, review such an order as that involved here, no case can be found in which an order granting a new trial in a criminal case for insufficiency of the evidence was reversed. Conceding the jurisdiction of the court, it would be an exceedingly plain case which would warrant our doing so." There is no doubt but that the result of the decisions is to place the trial judge in the jury box with an absolute veto over the other twelve jurors, in all cases of conflicting evidence; but there is much practical justice in having one juror whose final verdict is usually uninfluenced by passion, popular clamor, or class or race hatred.⁵

⁴ 120 Cal. 298, 299, 52 Pac. 657.

⁵ That this is the result of the authorities is seen from an oft-quoted and approved opinion of Justice Brewer in *Kansas Pac. Ry. Co. v. Kunkel*, 17 Kan. 172, where he said: "The one (the trial judge) has the same opportunity as the jury for forming a just estimate of the credence to be placed in the various witnesses, and, if it appears to him that the jury have found against the weight of evidence, it is his imperative duty to set the verdict aside. We do not mean that he is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of

But the concession to the trial court goes even further where a new trial has been granted. And where no reason is given by the trial judge for the order granting a new trial, if the evidence was conflicting and insufficiency of the evidence was one of the grounds of the motion, it will be presumed on appeal that it was granted because of insufficiency of the evidence and the order will be affirmed. Thus in *Edwards' Exr. v. Carson Water Co.*,⁶ the court said: "The evidence in this case is conflicting and obscure in many particulars. The motion for a new trial was made upon the ground, among others, that the findings of fact were contrary to and not supported by the evidence, and that the judgment was contrary to law. It does not appear on what ground the motion was granted. The granting or refusal of a motion for a new trial on the ground of the insufficiency of the evidence to support the findings is addressed to the sound discretion of the judge who presided at the trial of the case in the lower court, and on an appeal from such order, where the court below, in the exercise of sound discretion, grants a new trial on conflicting evidence, appellate courts have always refused to disturb the order."

While the court has this broad discretion in deciding, yet it cannot evade the duty to decide. It cannot refuse to examine

the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness. But when his judgment tells him that it is wrong; that, whether from mistake, or prejudice, or other cause, the jury have erred, and found against the fair preponderance of the evidence—then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury." Extracting from the verbiage of this opinion its exact meaning it simply amounts to placing the trial judge in the jury-box with a controlling vote, in all cases of conflicting evidence. The duty and province of the trial court to "weigh" the evidence and be governed by the result of his opinion formed thereupon is asserted in many of the cases previously cited herein. See, also, *Larsen v. Oregon Ry. etc. Co.*, 19 Or. 240, 247, 23 Pac. 974; *State v. Billings*, 81 Iowa, 99, 45 N. W. 862; *City of Tacoma v. Tacoma Light etc. Co.*, 16 Wash. 288, 47 Pac. 738; *Hawkins v. Reichert*, 28 Cal. 534; *Dickey v. Davis*, 39 Cal. 565; *Bennett v. Hobro*, 72 Cal. 178, 13 Pac. 473; *Reid v. Young*, 7 App. Div. 400, 39 N. Y. Supp. 899; *First Nat. Bank v. Wood*, 124 Mo. 72, 27 S. W. 554.

⁶ 21 Nev. 469, 492, 34 Pac. 381. To same effect, *Kellenberger v. Market St. Ry. Co. (Cal.)*, 33 Pac. 90. See, also, post, §§ 681, 683.

the evidence to ascertain whether the verdict is contrary to the evidence, that being one of the statutory grounds for a new trial,⁷ and the mere fact that the jury are the exclusive judges of all questions of fact submitted to them does not justify the judge of the trial court in declining to examine the sufficiency of the evidence upon which the verdict rests, when it is challenged by a motion for a new trial. And whenever it is manifest that the jury have found against the clear weight of the evidence, and that the party asking for a new trial has not, in all probability, had a fair trial, nor received substantial justice, it is his imperative duty to set the verdict aside and grant a new trial.⁸

No clearer guide to the point at which discretion of trial courts ends can be found than in the case of *Clifford v. Denver S. P. & P. R. Co.*⁹ In that case it was urged that the presumption was always in favor of the action of the court when it granted a new trial, because the court was vested with discretionary power and it was never interfered with except in a clear case of abuse. The court said: "Trial courts may certainly exercise a reasonable discretion in granting new trials, when discretionary grounds exist and are relied on by the applicants. It seems to us, however, that, if the rule of practice concerning judicial discretion be as broad as contended for by appellee's counsel, a statute authorizing an appeal from such an order is of little practical effect, for the exercise of judicial discretion would render it a dead letter. In order to give it reasonable effect, trial courts must be required to make correct rulings on legal propositions. Where the ground of the application is insufficiency of the evidence to support the verdict; that the verdict is against the weight of the evidence; that it is unjust and inequitable, and the like—a reasonable degree of discretion exists to allow or deny a new trial; and, when the questions involved in the application are close, the ruling of the court should not be interfered with. On the other hand,

⁷ *State v. Young*, 119 Mo. 495, 24 S. W. 1038; *Cherokee etc. M. Co., v. Stoop*, 56 Kan. 426, 43 Pac. 766; *Chicago B. & Q. R. Co. v. Guild*, 3 Kan. App. 736, 45 Pac. 452; *Reid v. Lloyd*, 1 Mo. App. 411; *Dean v. Fire Assn.*, 2 Mo. App. 1282.

⁸ *Cherokee & P. Coal & Mining Co. v. Stoop*, 56 Kan. 426, 43 Pac. 766.

⁹ 12 Colo. 128, 20 Pac. 335.

if the ground of the motion relied on does not in fact exist, or does not constitute a legal ground for a new trial, or the necessity for the application is the result of the applicant's negligence, the motion should be denied or the ruling held to be erroneous. The discretion vested in the trial court to grant or refuse a new trial is neither an arbitrary nor a general discretion. It is based on the theory that the judge who tries a case, having the parties, their witnesses and counsel before him, with opportunity to observe their demeanor and conduct during the trial, and to note all incidents occurring during its progress likely to affect the result thereof, is better qualified to judge whether a fair trial has been had, and substantial justice done, than the appellate tribunal. But the fact that the legislative assembly passed a law giving the right of appeal from such orders indicates a purpose to restrict the rulings upon the subject to the application of legal principles." And an order denying a new trial was reversed where the trial judge in denying a new trial stated that the facts of the case were considerably mixed, but it was a rule of his to rarely invade the province of the jury in setting aside their verdicts, if there were any substantial facts to support the same, it being held the duty of the trial judge, on a motion for a new trial, to weigh the evidence for himself, and decide whether the verdict was warranted thereby.¹⁰

¹⁰ Nashville etc. R. Co., v. Neely, 102 Tenn. 700, 52 S. W. 167. See, also, Serles v. Serles, 35 Or. 289, 57 Pac. 634; Sharp v. Greene, 22 Wash. 677, 687, 62 Pac. 147. In the second case cited the court said: "It is strenuously urged, however, that the court below decided the motion for a new trial upon an erroneous principle of law, in this: That it was governed, as is shown by its written opinion, by the idea that, if there was any evidence in the record to support the verdict, it was without power to disturb the same or set it aside; whereas it is insisted that it is the duty of the court, in the consideration of the motion for a new trial, based upon the insufficiency of the evidence, to weigh all the evidence submitted to the jury, and if, upon the whole case, the verdict appears to be against the weight of evidence and is manifestly unjust, to allow the motion. . . . Under the statute (Hill's Ann. Laws, § 235, subd. 6), the court is authorized to set aside a verdict and grant a new trial for 'insufficiency of the evidence to justify the verdict or other decision or that it is against law' This statute does not appear to have received any direct construction by this court; but there are authorities elsewhere pertinent to the inquiry, and they leave no doubt but

There is a well-established distinction between insufficiency of evidence in point of law and insufficiency in point of fact. The former is usually a question for appellate courts, while the latter is almost exclusively to be dealt with by trial courts. Such evidence is said to be insufficient in law only where there is a total absence of proof, either as to the quantity or kind, or from which no inference could be drawn in support of the fact sought to be established. But insufficiency in point of fact may exist where there is no insufficiency in point of law; that is, there may be some evidence to sustain every element of the case, competent both in quantity and quality under the law, and yet

that, in passing upon the sufficiency of the evidence to support the verdict, the trial court is authorized to weigh and consider all the evidence which has been submitted to the jury, and if it is ascertained that the verdict is against the clear weight thereof, or is one that is manifestly unjust, or that reasonable men would not adopt or return, to set it aside and grant a new trial." In the last case above cited the court after quoting from the opinion of the trial judge, said: "These are the only reasons assigned for granting the new trial. The judge who tried the case was from Tacoma and held the court at the request of the superior judge of King county. No objection before or during the trial was made as to the trial of the case by this judge, and such objection is not made in the motion for a new trial. We are not aware of any rule of law that disqualifies a judge from properly weighing the testimony of a witness because of the high character of the witness, or because the judge is personally acquainted with him, or that requires the judge to be acquainted with all the witnesses, in order that he may intelligently pass upon their testimony. A judge decides the facts in a case like this from the evidence produced in the trial, and not from a general knowledge of the personal character of witnesses testifying in the case, or the local situation and surroundings of the matter in controversy. A new trial for reasons not authorized by law is an injury and loss to the party who has prevailed in the first trial; also, the public good requires that there be an end to litigation. It is a maxim of the law that a man shall not be twice vexed for one and the same cause. The court says, in granting the motion, if he was called upon to again render judgment in the case upon the same testimony, that he would render it for the defendants. If the facts justified such a judgment, it is immaterial whether the reasons given for arriving at that conclusion in the first instance are sound or not. The court assigned no legal cause for granting the motion for a new trial, and an examination of the records fails to show any such cause. The court granted the new trial, because, in his own language, 'at all events, a new trial can do no injury to anyone, and might insure a more substantial justice.' "

it may be met by countervailing proof so potent and convincing as to leave no reasonable doubt of the opposite conclusion. So it is that, upon a review of the whole evidence, the testimony in support of the cause of action or defense may be so slight, although competent in law, or the preponderance against it may be so convincing, that a verdict may seem to be plainly unreasonable and unjust; and in many cases it might be the duty of the court to withdraw the case from the jury, or to direct a verdict in a particular way, yet in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial.¹¹

In Oregon, there is no appeal from an order granting or refusing a new trial. Consequently, there is no investigation in the appellate court on direct appeal from the order of the question of abuse or proper exercise of discretion.¹² And findings of fact by the court below are conclusive until set aside in the lower court.¹³ And yet the established principles, as above stated, govern the trial judges in Oregon as elsewhere, where the appeal is from the judgment, and the findings, verdict or other decision are attacked in proper form, for insufficiency of evidence.¹⁴ The practice there is to except to the order of the trial court on motion for new trial and have the ruling reviewed on appeal from the judgment.

§ 238. The varied expressions of the courts.

Many sound views of the proper province of the trial court are met with in opinions which nevertheless are of little value

¹¹ See *Metropolitan R. R. Co. v. Moore*, 121 U. S. 558, 7 Sup. Ct. Rep. 1334.

¹² See *State v. Mackey*, 12 Or. 154, 6 Pac. 648; *State v. Foot You*, 24 Or. 70, 32 Pac. 1031, 33 Pac. 537; *State v. Crockett*, 39 Or. 76, 65 Pac. 447; *State v. Wilson*, 6 Or. 428; *State v. Powers*, 10 Or. 152, 45 Am. Rep. 138; *State v. McDonald*, 8 Or. 118; *State v. Fitzhugh*, 2 Or. 227; *McBride v. Northern Pac. R. R. Co.*, 19 Or. 71, 23 Pac. 814; *Hallock v. Portland*, 8 Or. 30; *Kearney v. Snodgrass*, 12 Or. 315, 7 Pac. 309; *Hauser v. West*, 39 Or. 392, 65 Pac. 82; In an early case a different principle was recognized, and it was held that a verdict that is subject to no other objection should not be set aside because the judge differs from the jury as to the preponderance of evidence: *Oregon Cascades R. R. Co. v. Oregon Steam Nav. Co.*, 3 Or. 178.

¹³ *Kyle v. Ripley*, 19 Or. 186, 25 Pac. 141.

¹⁴ See ante, § 19.

as guides for reaching the point where the proper exercise and the abuse of discretion meet. Except for the allowance which must be made for the better opportunity of the trial judge to observe the manner of the witnesses and to experience the environment of the trial, the word "province" would appear to stand as a better term with which to designate the idea in mind than "discretion." But for these the question is purely legal. The latter term, however, has been used too long and generally to be now supplanted.

The federal courts concede largely to the discretion and knowledge of trial courts; and it is held that the federal courts having appellate jurisdiction will not disturb a verdict because against the weight of evidence, however decided that weight may be, if any evidence has been given which would have rendered it improper for the court to direct a verdict.¹⁵ But if, conceding to the evidence the greatest probative force which the law allows, according to the law of evidence, it is insufficient to support the verdict, the court will set aside the verdict and grant a new trial.¹⁶

In California, it is now fully settled, by several successive decisions of the supreme court, that in the matter of granting new trials, where the evidence upon vital points in the case is conflicting, or as is sometimes expressed, "not all one way," the lower court has entire control, and the opinion of the trial judge as to where the weight of evidence lies must prevail.¹⁷

¹⁵ *Spiro v. Felton* (C. C.), 73 Fed. 91; *Ulman v. Clark* (U. S. C. C.), 100 Fed. 180.

¹⁶ *Southern Pac. Co. v. Hamilton* (C. C. A.), 54 Fed. 468.

¹⁷ *In re Martin*, 113 Cal. 479, 45 Pac. 813; *Shumway v. Leakey* (Cal.), 11 Pac. 839; *White v. Merrill*, 82 Cal. 14, 22 Pac. 1129; *Domico v. Casassa*, 101 Cal. 411, 35 Pac. 1024. Verdict will not be set aside as contrary to evidence where there were but two parties to the transaction, one of them is dead, and the survivor, the only witness, is contradicted on other matters, and does not testify positively as to the existence of the fact on which the jury found: *Thompson v. Toland*, 48 Cal. 99. Principle stated in text above recognized in *Baxter v. Hamilton*, 20 Mont. 327, 51 Pac. 265; *Barnett v. Brown*, 18 Mont. 367, 45 Pac. 551; *Ray v. Cowan*, 18 Mont. 249, 44 Pac. 821; *Harrington v. Butte etc. Min. Co.*, 19 Mont. 411, 48 Pac. 758; *Nyhart v. Pennington*, 20 Mont. 158, 50 Pac. 413; *Bernier v. Anderson* (Idaho), 70 Pac. 1027.

But the conflict must be substantial and not shadowy; and where the alleged conflict is utterly unsubstantial and trivial it must be considered that there is none,¹⁸ and where fraud was charged in the sale of property by the executors of an estate, and inadequacy of consideration was relied upon to raise the presumption of fraud, and the only substantial conflict in the evidence was expert testimony as to the value of the property, and the court had no doubt as to the evidence and the correctness of the decision thereon, and, in granting a new trial, assigned no legal ground therefor, but declared that, if called upon to again render judgment on the same evidence, it would render the same judgment, its action was held to constitute an abuse of discretion.¹⁹

A finding must be supported by the legal effect of relevant and material evidence in order to withstand a motion for a new trial on the ground that the evidence is conflicting; and a finding that the death of the insured was not accidental, made against the legal effect of the evidence, was held ground for the reversal of an order denying a new trial.²⁰ And the alleged

¹⁸ *Landsman v. Thompson*, 9 Mont. 182, 22 Pac. 1148. See, also, *Field v. Shorb*, 99 Cal. 661, 34 Pac. 504; *Caldwell v. Willey*, 16 Colo. 169, 26 Pac. 161. It was held an abuse of discretion for the trial court to set aside a verdict for plaintiff and grant a new trial for insufficiency of evidence, in a suit to recover a balance of an account, where it appeared that the account had been running over a year, during which time numerous payments were made, that defendant was a sole trader, and that the goods were delivered to and consumed by her employees at her places of business, which facts were not disputed, except that the payments were by her husband, who appeared from the evidence to be acting as her agent: *Falk v. Brown*, 13 Mont. 125, 32 Pac. 492.

¹⁹ *Sharp v. Greene*, 22 Wash. 677, 62 Pac. 147.

²⁰ *Jenkin v. Pacific Mut. Life Ins. Co.*, 131 Cal. 121, 63 Pac. 180.

Law of the case settled on former appeal.—Where the principal question of fact related to the validity of a sale of the personal property involved in the action to the defendant, and the evidence was substantially the same as that considered by the supreme court upon a former appeal, upon which it was held that the evidence did not show an immediate delivery and actual and continued change of possession, as required by section 3440 of the Civil Code, it was held that an order granting a new trial, in harmony with the view of the evidence taken by the supreme court, should be affirmed: *Byxbee v. Dewey*, 128 Cal. 322, 60 Pac. 847. See, also, post, § 691.

conflict must be upon a material point. Accordingly, where in an action to quiet title, a former conveyance to the plaintiff by a debtor, being assailed as a fraud upon his creditors, by the defendant, who claimed as subsequent purchaser at sheriff's sale under execution upon a judgment against the debtor, and a new trial was granted to the defendant for insufficiency of the evidence to justify findings that the conveyance to the plaintiff was not in fraud of creditors, it was held that the order should be reversed upon appeal because the sale to the defendant, as execution purchaser was void. In such case the question of fraud upon creditors was considered immaterial, and not affecting the plaintiff's ownership.²¹ And the competency of witnesses to testify to given facts will sometimes be considered. Where it appears that the testimony alleged to create a conflict was given by witnesses, who had no means of knowing the facts, such testimony will not be effective to create a conflict.²² But all evidence which is actually admitted must be given effect, if material to the issue, although an objection to its competency, if made when offered, must have been sustained. And it was held that an order setting aside a verdict for defendants and granting a new trial on the ground that their evidence did not sustain their affirmative defense should not be disturbed on appeal, although the only evidence of a fact essential to plaintiff's recovery was a purported signature on an instrument

²¹ O'Donnell v. Merguire, 131 Cal. 527, 82 Am. St. Rep. 389, 63 Pac. 847. In a trial in an action of ejectment upon a question of boundary the testimony of five unimpeached witnesses stood opposed to the description contained in a deed to which one of the parties was a stranger, the court found the fact as recited in the deed. Held that the finding was so far opposed to the evidence as to justify awarding a new trial: Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111.

²² See State v. Alta Mining Co., 24 Nev. 230, 51 Pac. 982. Where the only evidence in support of a verdict is that of the deputy assessor, and it is shown that he has no knowledge of the business of the road, had not examined the reports of the company filed in accordance with the law, and that, if he had known of a decrease in the earnings of the road, it would not have influenced his valuation upon it, such evidence is insufficient to create a substantial conflict in the evidence where the undisputed facts were that, according to the correct method of valuation the assessment was too high: State v. V. & T. R. R. Co., 23 Nev. 432, 49 Pac. 38.

erroneously admitted, where no specific objection was made, that the signature had not been proved.²³

Where the trial judge has granted a new trial without stating his reasons, but one of the grounds of the motion, is that the evidence was insufficient to justify its findings, if the record discloses that there was a conflict in the evidence, material to the issue, the order will not be disturbed on appeal.²⁴ And where the case has been tried by a jury, under a fair and impartial charge by the court, it is immaterial, as affecting the duty of the court sitting in review, that the court, if left to itself, would have to come to a different conclusion.²⁵ The rule which should govern trial courts herein, with respect to the verdicts of juries, is thus well expressed by the supreme court of Maine: "A motion to set aside a verdict as against evidence will not be sustained where the preponderance of evidence is not so great, as to satisfy the court that the verdict was the result of bias, prejudice or mistake of the jury."²⁶ On

²³ *Corbitt v. Harrington*, 14 Wash. 197, 44 Pac. 132. Same principle applied in *Goode v. Smith*, 13 Cal. 84; *Jansen v. Brooks*, 29 Cal. 223; *Bliss v. Ellsworth*, 36 Cal. 312, holding a fact proved by affidavit in absence of objection; *Frink v. Alsip*, 49 Cal. 104, holding authority of agent sufficiently proven by copy of power of attorney admitted without objection; *Missouri Pac. Ry. Co. v. Johnson*, 55 Kan. Supp. 344, 40 Pac. 641. And the evidence must be considered, though erroneously admitted against objection: *McCloud v. O'Neill*, 16 Cal. 397; *Ashton v. Dashaway Assn.*, 84 Cal. 61, 70, 22 Pac. 660, 23 Pac. 1091; *Pierce v. Jackson*, 21 Cal. 636. Where defendant admitted that he owed part of the sum demanded, the judge very properly set aside a verdict in his favor and granted a new trial: *Jacobs v. Oren*, 30 Or. 593, 48 Pac. 431. But mere preponderance of evidence cannot require a new trial: *Brand v. Merritt*, 15 Colo. 286; *California Ins. Co. v. Gracey*, 15 Colo. 70, 24 Pac. 577. Same view taken with reference to mere numerical superiority of witnesses: *Alcorn v. Powell*, 703 Ky. Law Rep. 1353, 60 S. W. 520.

²⁴ *Sullivan v. Wallace*, 73 Cal. 307, 14 Pac. 789. See, also, post, §§ 683, 693.

²⁵ *Byrbee v. Dewey*, 128 Cal. 322, 60 Pac. 847. To same effect, *Lavigne v. Lewiston Mills Co. (Me.)*, 10 Atl. 62.

²⁶ *Shepherd v. Camden (Inhabitants of)*, 82 Me. 535, 20 Atl. 91. To same effect, *Wachlin v. Glencoe (Town of)*, 41 Minn. 499, 43 N. W. 967; *Smith v. St. Paul etc. R. Co.*, 44 Minn. 17, 46 N. W. 149; *Hanston etc. Central R. R. Co. v. Loeffler (Tex. Civ. App.)*, 59

the other hand, when the verdict is manifestly against the weight of the evidence, it is not only within the power, but it is the duty of the trial court to set it aside.²⁷ And yet the verdict of a jury, where duly considered and regularly found and returned into court is entitled to great respect and should not be disturbed unless plainly against the weight of the evidence.²⁸ And in Colorado the power of courts to set aside verdicts for insufficiency of the evidence, is confined to cases where the conflict in the evidence is but slight, and the preponderance against the verdict so palpable as to clearly defeat the ends of justice if permitted to stand.²⁹ Unusual consider-

S. W. 558. Held, that where the evidence leaves the question submitted to the jury in doubt and in a state of uncertainty, and it is apparent that the matters left in doubt by the evidence are susceptible of being cleared up, a new trial will be granted: *Georgia Banking & R. Co. v. Miller*, 90 Ga. 571, 16 S. E. 939.

²⁷ *Garton v. Stern*, 121 Cal. 347, 53 Pac. 904; *Franz v. Mendonca*, 131 Cal. 205, 63 Pac. 361; *Newman v. Overland Pac. Ry. Co.*, 132 Cal. 73, 64 Pac. 110; *Warner v. The F. Thomas Parisian D. & C. Works*, 105 Cal. 409, 38 Pac. 960; *Belt Ry. Co. v. Kinnane*, 83 Ill. App. 200; *Cable v. Byrne*, 38 Minn. 534, 8 Am. St. Rep. 696, 38 N. W. 620; *Irving v. Cunningham*, 58 Cal. 308; *Hawkins v. Abbott*, 40 Cal. 639; *Mason v. Austin*, 46 Cal. 385; *Beck v. Beck*, 6 Mont. 285, 12 Pac. 646. Though the evidence be conflicting, "if the verdict is clearly against the weight of the evidence, and does not meet the approval of the court, it should be set aside": *Treton v. Treton*, 62 Kan. 358, 63 Pac. 429. "The verdict should be set aside if the trial judge be satisfied it is not warranted by the evidence": *Harrington v. Butte etc. Min. Co. (Mont.)*, 69 Pac. 102. Verdict not disturbed in cases of conflicting evidence where, when most favorably considered in favor of the losing party, it does not appear that the verdict was not warranted by the evidence: *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880.

²⁸ *Marshall v. Valley R. Co.*, 97 Va. 653, 34 S. E. 455. See, also, *Nicholas v. Peck*, 20 R. I. 533, 40 Atl. 418; *Nashville etc. R. R. Co. v. Neely*, 102 Tenn. 100, 52 S. W. 167; *Cruikshank v. Ins. Co.*, 75 Minn. 266, 77 N. W. 958; *White v. Grocer Co.*, 65 Ark. 278, 45 S. W. 1060.

²⁹ See *Button v. Higgins*, 5 Colo. App. 167, 38 Pac. 390, and *Barth v. Jones*, 7 Colo. 464, 4 Pac. 781, holding that, when evidence is conflicting, the jury are the judges of the credibility of the witnesses, and their finding cannot be reviewed: *Doane v. Glenn*, 1 Colo. 495; holding that, if there is some evidence to support the verdict, the court will not usurp the function of the jury and disre-

ation is also given to verdicts in Missouri, and in that state it appears that a new trial will not be granted on the ground that the verdict is against the weight of evidence, unless the evidence excludes every rational inference, in support of the verdict.³⁰ Upon the propositions above expressed, except in the two states last mentioned, and possibly one or two others, there will not be found any considerable divergence in the authorities. It would be very difficult, however, and probably impossible, to suggest any standard acceptable as a test for determining when a verdict is "clearly against the weight of the evidence." It was said in *Jameson v. Weld*,³¹ that it is not enough that the verdict may be wrong or that the court might have come to a different conclusion, unless the verdict is, on all the evidence clearly wrong. The same has been said in scores of cases; and yet the difficulty of conforming this reasonable rule to the opinion of each individual judge on the question of clear wrongfulness of the verdict, upon all the evidence remains. But the

guard it: *Bell v. Rhodes*, 3 Colo. 80, holding that the verdict being for the defendant in an action ex delicto and the evidence conflicting without a decided preponderance in favor of the plaintiff, the verdict would not be disturbed upon the ground merely that it was against the evidence: *Chapin v. Godell*, 2 Colo. 608, holding that a verdict should be sustained if by any fair construction the evidence warrants it. See, also, *Browne v. Steck*, 2 Colo. 70; *Bank of Leadville v. Allen*, 6 Colo. 594; *Sylvestre v. Blaney*, 12 Colo. 206, 20 Pac. 621; *Mack v. Jackson*, 9 Colo. 536, 13 Pac. 542; *Blanchard v. Jno. Mouat L. Co.*, 5 Colo. App. 64, 36 Pac. 1114; *Knight v. Fisher*, 15 Colo. 176, 183, 25 Pac. 78; *Hall v. Linn*, 8 Colo. 264, 268, 5 Pac. 641; *Denver & Rio Grande Ry. Co. v. Bourne*, 11 Colo. 59-63, 16 Pac. 839. The earlier Montana decisions were practically to same effect: See *Lincoln v. Rodgers*, 1 Mont. 217. Cited in *Carron v. Wood*, 10 Mont. 506, 26 Pac. 388; *Mattock v. Goughnor*, 11 Mont. 274, 28 Pac. 301; *Francisco v. Benipe*, 6 Mont. 245, 11 Pac. 637; *Beck v. Beck*, 6 Mont. 286, 12 Pac. 646; *Ramsey v. Cortland Cattle Co.*, 6 Mont. 501, 13 Pac. 247.

³⁰ *Bims Bros. Bag Co. v. Ryan Commission Co.*, 74 Mo. App. 627.

³¹ 93 Me. 345, 45 Atl. 299. See, also, *Lisbon (Inhabitants of), v. Winthrop (Inhabitants of)*, 93 Me. 541, 45 Atl. 528; *Rivenburgh's Estate*, 74 Minn. 525; *Bank of Chadson v. Anderson*, 7 Wyo. 441, 53 Pac. 280; *Craswell v. South Brooklyn Ferry etc. Co.*, 57 N. Y. Supp. 827, 27 Misc. 822. If the evidence be such that the jury might find either way, it is error to set aside their verdict, in Connecticut: *Lewis v. Healey*, 73 Conn. 136, 46 Atl. 869.

rule recognizing the exclusive province of the trial judge to determine the weight or preponderance of the evidence, is not applied in the appellate courts having jurisdiction to review questions of fact as well as of law. And in such jurisdictions, the order of the trial judge setting aside the verdict as not sustained by the evidence will be reversed where there is a decided preponderance of evidence to support it;³² and will be affirmed where the preponderance of the evidence is not manifestly in favor of the verdict.³³

§ 239. In criminal cases.

The questions of weight of evidence or preponderance of evidence seldom arise in criminal cases.³⁴ It is doubtful if the defendant in a criminal case should ever be called upon to measure strength with the prosecution in quantity and quality of evidence, except in exceptional instances, such as when he sets up the plea of *autrefois acquit* or *autrefois convict*. And as a general rule, a defendant against whom a verdict of guilty has been returned, in a criminal prosecution should be awarded a new trial, if the evidence is insufficient to establish his guilt with that degree of certainty, which the law requires.³⁵ This requirement is that, although the evidence be consistent with the defendant's guilt, yet it must exclude every reasonable hypothesis than that of his guilt.³⁶ And where these requirements are not met to the satisfaction of the trial judge, he should award a new trial.³⁷ The supreme court of California, has

³² *Spurlock v. West*, 80 Ga. 302, 4 S. E. 891.

³³ *Werner v. Shroeder*, 38 Minn. 321, 37 N. W. 449; *Buffner v. Hill*, 31 W. Va. 428, 7 S. E. 13.

³⁴ In *People v. Ashnauer*, 47 Cal. 98, 100, the court appears to have recognized the test of preponderance as applying in a criminal case; but the language of the learned justice may be considered as dicta and inapplicable.

³⁵ *Fann v. State*, 112 Ga. 230, 37 S. E. 378.

³⁶ *Shay v. State*, 112 Ga. 541, 37 S. E. 884; *Territory v. Behberg*, 6 Mont. 467, 13 Pac. 132. Where the evidence on a trial for murder was purely circumstantial in its nature, and the circumstances therein were insufficient to establish guilt beyond all reasonable doubt, the granting of a new trial, on the ground that the verdict was without evidence, was held improperly denied: *Orr v. State*, 114 Ga. 527, 40 S. E. 697.

³⁷ *People v. Lun Yit*, 83 Cal. 130, 23 Pac. 228.

shown exceptional liberality in upholding orders of trial courts granting new trials in criminal cases. It was said in one case, that an order granting a new trial to a defendant in a criminal case on the ground of the insufficiency of the evidence to justify the verdict of conviction is within the discretion of the trial court, and it is the duty of the judge to grant a new trial when, in his opinion, the interests of justice require it,³⁸ and in *People v. Tapia*³⁹ it was said: "Where the judge before whom a defendant convicted of murder was tried is convinced that the evidence was not sufficient to warrant the verdict, it is his duty to grant a new trial; and he ought not, in such case to deny a new trial, and leave it to this court upon appeal to pass upon questions of fact, upon which the trial court alone has jurisdiction to pass. This court has appellate jurisdiction in criminal cases on questions of law alone, and cannot pass upon the insufficiency of the evidence, unless, as a matter of law, there is no evidence tending to support the verdict."

§ 240. Different remedies for insufficiency of evidence.

Motion for new trial is by no means the only method of testing the sufficiency of evidence at a trial. If one or more material allegations in the complaint are entirely without support in the evidence, when plaintiff rests, the defendant may take advantage of the defect by motion for nonsuit; or he may reserve the point until he has introduced evidence on his own behalf and then ask an instruction that a verdict be returned for defendant. On the other hand, if the defendant, pro haec vice admits the allegations of the complaint, and relies exclusively upon an affirmative defense in support of which his evidence is sufficient to support a verdict or other decision the plaintiff may avail himself of the defect by asking that a verdict be directed in his favor. But the question whether a nonsuit would or would not be sustained on appeal cannot generally be used as a test of the propriety or impropriety of granting a motion for new trial, for the reason that the two motions are governed by somewhat different principles. The court may grant defendant a new trial, if dissatisfied with the verdict, notwithstanding that the evidence was strong enough to withstand

³⁸ *People v. Chew Wing Gow*, 120 Cal. 298, 52 Pac. 657.

³⁹ 131 Cal. 647, 63 Pac. 1001.

a motion for nonsuit,⁴⁰ or to render it improper for the court to direct a verdict for the defendant.⁴¹ And it was held that an order granting a new trial on defendant's motion, for error in overruling his motion for a nonsuit, made after the closing of plaintiff's case, and after hearing all the evidence, practically grants it on the ground of the insufficiency of the evidence to justify the verdict for plaintiff.⁴² In the opinion in this case the court (per McFarland, J.), made valuable suggestions both as to the proper practice and rule of decision relatively upon motions for nonsuit, for a directed verdict, and for new trial on the ground of insufficiency of evidence as follows: "If the court had merely granted the new trial without stating the grounds upon which it was granted, or if 'insufficiency of the evidence to justify the verdict' had been stated as one of the grounds, it is probable that this appeal would never have been taken; for in that event, it could not have been argued with any plausibility that setting aside the verdict for want of evidence was an abuse of discretion. But, practically and substantially, the court did grant a new trial on the ground of the insufficiency of the evidence to justify the verdict, although the judgment of the court to that effect was expressed in the roundabout way of holding that the motions for nonsuit should have been granted. If the court believed that the evidence for plaintiff was insufficient to justify the verdict in her favor, and that therefore the first motion for a nonsuit should have been granted, it must necessarily have believed that all the evidence in the case was insufficient to justify such a verdict; for clearly what was introduced after plaintiff had closed her evidence in chief did not in any way strengthen her case. But there was a second motion for nonsuit made after all the evidence was in, and the rule with respect to such a motion is, that 'a

⁴⁰ *Morris v. Imperial Ins. Co.*, 106 Ga. 461, 32 S. E. 595; *Wulf v. Sullivan*, 24 Wash. 306, 64 Pac. 535; *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

⁴¹ *In re Rivenburgh's Estate* (Minn.), 77 N. W. 422.

⁴² *Fox v. Southern Pac. Co.*, 95 Cal. 234, 30 Pac. 384. A trial judge may grant a new trial in case of serious doubt, as where he is convinced that the jury have not fully comprehended or fairly considered the evidence, though he might not be justified in directing a verdict on the evidence: *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

court is justified in granting defendant's motion for nonsuit after the evidence on both sides has been heard, in a case where, if the motion had been denied, and a verdict found for plaintiff, it would have been set aside as not supported by, but contrary to the evidence.'⁴³ Practically, therefore, the real question in the case at bar is whether or not the court abused its discretion in holding that the evidence was insufficient to support the verdict; and it is clear to us, from an examination of the evidence that this question must be answered in the negative." The only remedy, however, after submission and decision is the motion for new trial; and where a verdict has been returned for plaintiff, the defendant cannot base his right to a judgment on the insufficiency of the evidence, his only remedy being a motion to set aside the verdict and for a new trial.⁴⁴ Nor, on the other hand, does the defendant waive the insufficiency of the evidence by failing to move for a nonsuit at the proper time, where his own evidence does not strengthen plaintiff's case.⁴⁵ The same rule would apply where defendant's evidence in support of a confession and avoidance is insufficient. Plaintiff would not be estopped from urging it as ground for a new trial, notwithstanding his failure to ask an instruction directing a verdict for plaintiff, unless he had introduced evidence in rebuttal which materially strengthened such defense.

§ 241. Verdict should be set aside where evidence fails to prove any material fact.

It is as fatal to a cause of action alleged by a plaintiff, or to an affirmative defense, exclusively relied upon by a defendant to fail in his proofs as to one essential fact as to fail through-

⁴³ Citing *Geary v. Simmons*, 39 Cal. 224.

⁴⁴ *Floyd v. Colorado Fuel etc. Co.*, 10 Colo. App. 54, 50 Pac. 864. After plaintiff closed his evidence, it was stipulated that, if the court should subsequently hold defendant's motion for nonsuit should be sustained, plaintiff would be permitted to take a nonsuit, and then the trial was proceeded with. The jury returned a verdict for plaintiff, and on motion of defendant the court granted him a new trial. It was held on appeal to be a mistrial, and the order granting a new trial was affirmed: *Doing v. New York etc. R. Co.*, 17 N. Y. Supp. 689, 63 Hun, 626.

⁴⁵ *Sweeney v. Coe*, 12 Colo. 485, 21 Pac. 705.

out the entire range and scope of his allegations, and the evidence is insufficient in the one case as in the other. Accordingly, where a material finding of fact is unsupported by evidence, and is contradictory of other findings, the failure to make the finding in accordance with the evidence necessitates a new trial.⁴⁶ And where the plaintiff failed to prove the agency of a person claimed to have acted for the defendant, it was held a new trial should be ordered for insufficiency of the evidence.⁴⁷ So where it did not appear from the brief of evidence used at the hearing of the motion that the venue of the crime had been proven, it was held error to refuse a new trial.⁴⁸ A clear mistake in computation by the jury, especially if the difference between the amount found and the correct sum be considerable, will usually entitle the party against whose interest the mistake was made to a new trial. Thus it was held that a new trial should be granted where the jury had computed upon the basis of too high a rate of interest.⁴⁹ And in an action of replevin for two mules, a wagon and harness, where there was no evidence as to the wagon and harness, it was held that a general verdict for the plaintiff should be set aside and a new trial awarded.⁵⁰ On the same principle, where in a suit on a promissory note, the defense went to the whole note, it was held that since the verdict must be either for the whole

⁴⁶ *Felton v. Le Breton*, 92 Cal. 457, 28 Pac. 490. See, also, *Hawkins v. Reichert*, 28 Cal. 534. In the first of these cases the court said: "The fact embraced in this finding is so material to the judgment, that a failure to make the finding in accordance with the evidence necessitates a new trial. If, however, we should assume that only that finding which is supported by the evidence is to be considered by us, under the principle that when a finding of fact is susceptible of two constructions, one of which is supported by the evidence and the other not, only that which is supported by the evidence will be considered, we must then hold that the findings do not support the judgment."

⁴⁷ *Clinch v. Canova*, 33 Fla. 655, 15 South. 427.

⁴⁸ *Clark v. State*, 110 Ga. 911, 36 S. E. 297. The testimony of an accomplice need not be corroborated on every item. Failure of this is not ground for a new trial: *Territory v. Corbett*, 3 Mont. 50.

⁴⁹ *Clark v. Gridley*, 35 Cal. 398. See, also, *Dorsett v. Crew*, 1 Colo. 18.

⁵⁰ *Carrothers v. Jones*, 1 Colo. 196.

amount claimed, or for nothing, a verdict for part of the claim should be set aside, as not warranted by the evidence.⁵¹

§ 242. Same rule applied in cases of special findings by jury.

It is immaterial whether the insufficiency appear in the decision by the court or in the verdict. It is also immaterial in the latter case whether the verdict be general or special. If general, the allegations of the party's pleading will be used for comparison with the evidence on the motion; if on special issues submitted, calling for special findings these may be looked to as a matter of convenience. And where special findings of a jury, returned with a general verdict, and essential to a recovery, are unsupported by any evidence, a motion for a new trial should be granted.⁵² But it is no ground for a new trial that the answers to interrogatories submitted to the jury, are not sustained by the evidence, or that they are contrary to law, unless the answers are so inconsistent with the general verdict that judgment should be rendered thereon, notwithstanding the general verdict.⁵³ And the same rule prevails where it is a question of the preponderance or weight of the evidence rather than a lack or insufficiency of evidence. The fact that a special finding by a jury is against the weight of evidence does not afford ground for setting aside its general verdict, where it is not inconsistent therewith, and there is ample evidence to sustain the general verdict, outside the question to which the special finding relates.⁵⁴ Of course if a special finding, and the general verdict are both unsupported by the evidence, or by the weight of the evidence, the verdict must be set aside.⁵⁵ And where special findings upon a material issue are contrary to the evidence, and inconsistent with each other, indicating that the jury did not fairly and intelligently consider the case, the general verdict should be set aside and a new trial granted.⁵⁶

⁵¹ *Conrad Seipp Brewing Co. v. Peck*, 85 Ill. App. 637.

⁵² *Atchison etc. Ry. Co. v. Long*, 46 Kan. 260, 26 Pac. 682.

⁵³ *Sievers v. Peters Box etc. Co.*, 151 Ind. 642, 50 N. E. 877, 52 N. E. 399.

⁵⁴ *Baker v. New York etc. R. Co. (U. S. C. C.)*, 101 Fed. 545.

⁵⁵ *Burton v. I. M. Yost M. Co.*, 6 Kan. App. 921, 51 Pac. 67.

⁵⁶ *Atchison etc. R. Co. v. Hine*, 5 Kan. App. 748, 47 Pac. 190. See *Hayes v. Fine*, 91 Cal. 391, 27 Pac. 772, where inconsistency of findings held to be harmless, order granting new trial reversed.

§ 243. Disbelief of evidence.

While it is true that the jury, or the court trying a case without a jury, is the exclusive judge, in the first instance of the weight of evidence and credibility of witnesses, yet, courts have never gone the length of setting aside verdicts and other decisions supported by clear, positive, consistent and uncontradicted evidence, or of sustaining them when contrary to such evidence. There are numerous authorities wherein evidence on behalf of one side only of cases have been successfully ignored by courts and juries, and their action in so doing upheld; but, in all such will be found the element of improbability, so that they were really instances in which the testimony was contradictory to common experience, or to facts which are the common knowledge of every individual of mature understanding. Further than this the courts have never gone. In *Blankman v. Vallejo*,⁵⁷ which may be accepted as the leading case in California on this subject, the court was careful to add to the statement of the doctrine the qualifying and explanatory words that "the inherent probability of a statement may deny it all claims to belief." Barring such exceptional cases, a new trial should be awarded where material, uncontradicted evidence has been disregarded by the jury, which, if considered and given due weight would require a different verdict from that returned.⁵⁸ The proposition is stated somewhat

⁵⁷ 15 Cal. 638, 645. See, also, *People v. Knutte*, 111 Cal. 453, 44 Pac. 166; *Landsman v. Thompson*, 9 Mont. 191, 22 Pac. 1148; *Mattock v. Goughnour*, 11 Mont. 265, 28 Pac. 301; *Mogk v. Peterson*, 75 Cal. 501, 17 Pac. 446; holding that the doctrine is peculiarly true of questions of mere knowledge or intent; *Baker v. Fireman's Fund Ins. Co.*, 79 Cal. 41, 21 Pac. 357, holding that the finding of the lower court as to the truth of testimony could not be reviewed; *McLennan v. Bank*, 87 Cal. 569, 25 Pac. 760, holding that the evidence of a witness was so contradictory that the court was not obliged to believe any of it; *Estate of Blythe*, 110 Cal. 236, 42 Pac. 643, holding certain evidence not entitled to consideration.

⁵⁸ *Chicago etc. R. Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976; *Michaud v. Friescheimer*, 16 Mont. 472, 41 Pac. 231; *Cunningham v. Gans*, 79 Huns, 434, 29 N. Y. Supp. 979. See, also, *Ohio etc. Ry. Co. v. McDanel*, 5 Ind. App. 108, 31 N. E. 836. Where the question of contributory negligence has been submitted to the jury, without objection, on undisputed evidence, which shows facts which would war-

more elaborately by the supreme court of Montana in *Boe v. Lynch*,⁵⁹ as follows: "True, the jury are the exclusive judges of the credibility of a witness, but they have no right to arbitrarily disregard testimony, where such disregard is not based upon anything appearing on the trial, and because of some caprice which rests solely in their own minds. A jury is not bound to accept the testimony of a witness, where it contains improbabilities such as to afford a reasonable basis for believing it to be untrue, or where there are reasonable grounds for believing it to be false; but where positive and direct testimony is wholly undisputed and uncontradicted, and the witness delivering it is not impeached or otherwise discredited, and there is no improbability or inconsistency apparent in it, or any disclosed by any facts or circumstances throughout the case, they cannot arbitrarily refuse to believe such testimony, and find a verdict directly contrary to it, and which finds no support whatsoever in the evidence. In such a case they should believe, for the purpose of the suit, the testimony of the unimpeached, uncontradicted witness, and it is the duty of the court to set aside a verdict founded upon a disbelief of such clear and uncontradicted evidence." Of course, a verdict in a criminal case, based upon evidence which is completely impeached, should be set aside as contrary to the weight of the evidence.⁶⁰

Verdicts contrary to the preponderance of evidence on the question of alibi in criminal cases have been sometimes upheld. But, in such cases any existing or apparent improbability is not the only weakening element to be considered. The jury is called upon in such case to elect between the evidence in support of the alibi, and that in support of the charge that the defendant was present at the scene of the crime, so that it is in effect a verdict upon conflicting evidence, a decision in reaching which they have passed upon the credibility of witnesses. It is so even in cases of circumstantial evidence, since they are cases of conflict between circumstances and the testi-

rant the court in determining as a matter of law, that there was contributory negligence, the verdict of the jury that there was not, may be nullified on the ground that the verdict is not supported by the evidence; *Nicholas v. Peck*, 21 R. I. 404, 40 Atl. 418, 43 Atl. 1038,

⁵⁹ 20 Mont. 80, 82, 49 Pac. 381:

⁶⁰ *State v. Prendible*, 165 Mo. 329, 65 S. W. 559.

mony in support of the alibi, or between the latter and that adduced to establish the existence of the circumstances.⁶¹

§ 244. Theory upon which trial conducted sometimes important.

The theory upon which a case is tried, with reference to the issues, is often important, and sometimes of controlling importance, in determining the sufficiency of evidence. Accordingly, where in an action for injuries arising from a defective railroad crossing, the only theory upon which a judgment could be sustained was that the defendant was negligent in making the crossing, and it appeared that the action was not tried on such theory, but on the theory that after the construction of the crossing it had got out of repair, and was negligently allowed to remain so, it was held that a new trial should be granted.⁶² And where, in an action for breach of contract, defendant waived his right to go to the jury on the question of the breach by requesting "to go to the jury upon the question of the amount" of damages sustained by the plaintiff, it was held that the defendant thereby admitted plaintiff's cause of action, and could not thereafter object to a verdict for the plaintiff upon the ground that it was rendered upon his unsupported testimony.⁶³

⁶¹ See *People v. Chun Heong*, 86 Cal. 329, 24 Pac. 1021. In this case Chief Justice Beatty, delivering the opinion, said: "The jury were instructed that, while it was necessary to prove the guilt of the defendant beyond a reasonable doubt, he could establish any fact essential to his defense by a mere preponderance of evidence. It is claimed that this was, in effect and by implication, an instruction that it was necessary for the defendant to prove an alibi, upon which alone he relied as a defense, by a preponderance of evidence. But it is not a necessary implication, from the language of the instruction, that the defendant must prove any fact relied on by him by a preponderance of evidence, and as to the alibi, upon which he relied, the jury was correctly and explicitly charged that the defendant must be acquitted in case of a reasonable doubt that he was present at the time and place of the murder. This was sufficient to cure any apparent error in the instruction objected to."

⁶² *Union Pac. Ry. Co. v. Springteen*, 41 Kan. 724, 21 Pac. 774.

⁶³ *Brown v. Baldwin & Gleason Co.* (Com. Pleas), 113 N. Y. Supp. 893.

§ 245. Same—Verdict for aggregate sum—More than one count—Only one supported.

Where the verdict is for an entire sum without any mention of separate items, covering two independent causes of action, on only one of which plaintiff is entitled to recover, an order setting the verdict aside and granting a new trial on the whole case, on the ground of the insufficiency of the evidence, is proper. In *Warner v. Thomas (The F.) Parisian D. & C. Works*,⁶⁴ the court said: "It is also claimed that the verdict covered two independent causes of action, and that as to one of those causes of action it is conceded to be right, and therefore it was error to set aside the entire verdict. But, the second cause of action was for seventy-one dollars, and the verdict was for an entire sum without any mention of the separate items. It was not error, therefore, to set the whole verdict aside."

§ 246. Application of rules to particular actions.

The rules governing the motion do not vary with respect to the character of the action, but are of uniform operation and applicability. Trial courts and juries, however, more carefully scrutinize the evidence as to its sufficiency and more closely observe the manner of witnesses, having regard also to consistencies and inconsistencies in some cases than in others. And, where great interests are at stake, or there are strong temptations to distort, exaggerate or falsify, they are naturally more exacting as to proofs than in cases of small importance, such temptations being absent. And appellate courts have given recognition and sanction to this tendency. Thus, in a will contest, on appeal from an order granting a new trial, the court (after stating the evidence) said: "To set aside a will made under these circumstances is a serious matter; and a verdict having that effect should be closely scrutinized by the trial judge. The upsetting of wills is a growing evil."⁶⁵

⁶⁴ 105 Cal. 409, 411, 38 Pac. 960; *Kent v. Abeel*, 12 Colo. 547, 21 Pac. 718.

⁶⁵ In *re Carriger*, 104 Cal. 81, 84, 37 Pac. 785. See In *re Smith's Estate*, 98 Cal. 636, 33 Pac. 744. Where the evidence is insufficient, as matter of law, to justify a verdict or decision that a will was executed under undue influence, it is ground for a new trial. The evidence in this case reviewed, and held insufficient in law to sus-

§ 247. In damage cases.

In what are popularly known as "damage cases," the party against whom a verdict has been rendered will be governed with reference to the ground of his motion by the character of the damage alleged. Damages are either actual or exemplary. Actual damages may be computable by known standards or are discretionary with the jury, while exemplary or punitive damages are always discretionary. If it be a case of computable damages, then, whether the motion be by the defendant, believing the damages awarded to be excessive, or by the plaintiff believing the damages awarded to be too small, he may not base the motion on the fifth ground in the statute⁶⁶ as for "excessive damages appearing to have been given under the influence of passion or prejudice." In all cases of computable damages, the verdict being considered excessive, the motion should be based on the ground that the verdict is not supported, or not justified by the evidence.⁶⁷ Nor should the motion be made on the ground of excessive damages where the action is for breach of contract.⁶⁸ The damages in such cases are usually computable by known measures. At any rate, it is scarcely conceivable how passion or prejudice could be present with the jury in such actions. Of course, any of the other grounds may be available in addition to the insufficiency of the evidence, but the latter ground is nearly or quite always a proper ground for the motion in such cases. And, where the damages, not being susceptible of exact computation by any known standard, as in cases of injury to the person or character, are to a great extent discretionary or optional, and the defendant considers them excessive, the better practice is to base the motion, *inter alia*, both on the ground of passion or

tain a verdict: *Estate of McDevitt*, 95 Cal. 17, 30 Pac. 101. To same effect, *In re Wilson*, 117 Cal. 269, 49 Pac. 172, 711; *Penn. etc. Co. v. Trust Co.*, 83 Fed. 896; *Estate of Carpenter*, 94 Cal. 406, 29 Pac. 1101.

⁶⁶ Cal. Code Civ. Proc., § 657, subd. 5.

⁶⁷ *Atchison v. Plunkett*, 61 Kan. 297, 59 Pac. 646; *Covert v. City of Brooklyn*, 39 N. Y. Supp. 744, 6 App. Div. 73; *Texas Central Ry. Co. v. Ascue*, (Tex.), 4 S. W. 13; *Gulf etc. Ry. Co. v. Thompson*, (Tex.), 16 S. W. 174.

⁶⁸ *Western Assur. Co. v. Studebaker Bros Mfg. Co.*, 124 Ind. App. 176, 23 N. E. 1138; *Marvin v. Sager*, 145 Ind. 261, 44 N. E. 310;

prejudice and insufficiency of the evidence, because the latter objection is generally present with the former. It appears that under the California statute and similar provisions elsewhere that passion and prejudice are not available to a plaintiff believing that damages are too small, and therefore plaintiffs in such cases must rely upon other grounds, insufficiency of the evidence being generally available. In *De Brutz v. Jessup*,⁶⁹ the court remarks that: "Even when, in the case of excessive damages, he is prepared to show that the excess indicates passion or prejudice, in such case he may rely upon either one of these grounds, that the evidence does not sustain the verdict, or that the verdict is the result of passion or prejudice." There is nothing in this expression which would preclude the party from relying upon both grounds, and, even if there were, it would be against reason and settled practice, there being no such thing as a compulsory election under the statute. And there is abundant authority for this view in decisions rendered subsequently to that above mentioned. In *Doolin v. Omnibus Cable Co.*,⁷⁰ the court said: "Plaintiffs contend that it is only when excessive damages appear 'to have been given under the influence of passion, or prejudice' that the court can make such excess the ground for a new trial; and that in the present instance the evidence so clearly shows the verdict to have been intrinsically reasonable that the action of the court in requiring the plaintiffs to remit fifteen thousand dollars therefrom as the condition of denying a new trial was an abuse of discretion. To say that a verdict for damages was enhanced by passion or prejudice is one mode of saying that the evidence

Thomas v. Merry, 113 Ind. 83, 15 N. E. 244; *McCormick Harvesting Machine Co. v. Gray*, 114 Ind. 340, 16 N. E. 787. In an action on a guardian's bond, the assignment as a cause for a new trial, that the verdict is excessive, does not call in question the amount of such verdict: *Hogshead v. State*, 120 Ind. 327, 22 N. E. 330. See, also, *Smith v. State*, 117 Ind. 167, 19 N. E. 744.

⁶⁹ 54 Cal. 119. See, also, *Lane v. Dayton*, 56 Minn. 90, 57 N. W. 328; *Conrad v. Dabmeir*, 57 Minn. 147, 58 N. W. 870.

⁷⁰ 125 Cal. 141, 144, 57 Pac. 777. See, also, *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019. In the latter case Van Fleet, J., delivering the opinion (page 162) appears to have entirely lost sight of the statutory ground upon which the motion rests and stated, in substance, that the evidence was the sole matter for consideration on the motion.

did not justify it; and the only means of discovering therein the elements of passion or prejudice, within the meaning of the statute, is by comparing the amount with the evidence which was before the court at the trial." Except in Minnesota, where the statutory provision is peculiar in this particular,⁷¹ and possibly in one or two other states where similar peculiarities are found, in all cases of inadequate damages the motion should be made on the ground of insufficiency of the evidence. Thus, where the evidence clearly showed that plaintiffs were largely and seriously damaged by water flowing over their land, and that a very large part of the water was caused to flow there by the act of defendants, it was held that a finding that the damage caused by the acts of the defendants was to the extent of only one dollar was against evidence.⁷² In such cases the

⁷¹ Under General Statutes of Minnesota, chapter 66, section 253, subdivision 4, as amended by Laws 1891, chapter 80, to set aside a verdict in an action for tort as inadequate or excessive, it must also appear that it was given under the influence of passion or prejudice: *Nelson v. Village of West Duluth*, 55 Minn. 497, 57 N. W. 149. See, also, *Dowd v. Westinghouse Air-Brake Co.*, 132 Mo. 579, 34 S. W. 493; *Brown v. Union Ry. Co.*, 51 Mo. App. 192. In Washington, a statute prohibits the granting of new trials for smallness of damages in certain cases. A statute provided that a new trial should not be granted on account of the smallness of the damages in an action for injury to the person, or reputation, nor in any other action in which the damages equal the actual pecuniary injury sustained, does not apply where special damages are pleaded and proven: *Jesse v. Shuck*, 11 Ky. Law Rep. 463, 12 S. W. 304.

⁷² *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; *Hall v. Bark Emily Banning*, 33 Cal. 522; *Woodford v. Lyon Gravel G. M. Co.*, 63 Cal. 483. To same effect, *Koebig v. Southern Pacific Co.*, 108 Cal. 235, 41 Pac. 469; *Mariani v. Dougherty*, 46 Cal. 26; *Bennett v. Hobro*, 72 Cal. 178, 13 Pac. 473; *Kerr v. Union Ry. Co.*, 45 N. Y. Supp. 819, 20 Misc. Rep. 871; *Carter v. Wells, Fargo & Co. (C. C.)*, 64 Fed. 1005. See *McQueen v. Mechanics' Inst.*, 107 Cal. 163, 40 Pac. 114, holding court not deprived of power to grant new trial as against evidence by fact that jury visited the premises and investigated for themselves. Other cases in which verdicts set aside for inadequacy of damages are: *Hamer v. White*, 109 Ga. 300, 34 S. E. 1001; *Noding v. Denison & P. Suburban Ry. Co.*, 22 Tex. Civ. App. 173, 54 S. W. 412; *May v. Hahn*, 22 Tex. Civ. App. 365, 54 S. W. 418; *Wilson v. Morgan*, 58 N. J. L. 426, 34 Atl. 752. A verdict for one-fourth of the proved value of horses killed by the alleged negligence of the defendant railroad is inconsistent, inadequate and will be set aside: *Smealy v. Chicago N. W. Ry. Co.*, 45 Ill. App. 426.

verdict for plaintiff establishes the fact of negligence on the part of defendant, and want of contributory negligence on the part of plaintiff.⁷³ But this holds good only where the evidence is sufficient to support a verdict against the defendant for some amount. And the court should deny the motion based on the assignment that the damages awarded are inadequate and insufficient, when the court is of the opinion that plaintiff was not entitled to recover anything, on the evidence adduced.⁷⁴ A verdict will not, however, be set aside for the inadequacy of the damages awarded, though on one issue they would be inadequate, when it may have been based on other issues, calling for a smaller recovery.⁷⁵

The subject of setting aside excessive verdicts is fully discussed elsewhere.⁷⁶

But there is a further distinction to be here noted between verdicts or other decisions which are merely excessive in amount, the damages being a mere matter of computation, and those wherein the amount of recovery is discretionary with the jury, for instance, in cases of personal injury. In the former cases the motion should be made under the present head. Thus, where in an action to recover the contract price of hydrant rentals, the defendant being entitled to deduction for an incomplete performance of the contract, the damages actually deducted by the referee were claimed to be less than the defendant was entitled to, it was held that a motion was properly made for a new trial, on the ground that the decision was not justified by the evidence.⁷⁷

⁷³ *Aherne v. Plate*, 34 Misc. Rep. 480, 70 N. Y. Supp. 254. Although the evidence of the plaintiff's right to recover be weak and unsatisfactory to the court, yet if being submitted to the jury they find in plaintiff's favor, thus resolving all doubts arising from the evidence in his favor, they should find substantial damages as proven; and in such case a verdict for nominal damages only should be set aside and a new trial granted: *Aiello v. Aaron*, 33 Misc. Rep. 798, 68 N. Y. Supp. 186.

⁷⁴ *Young v. Great Northern Ry. Co.*, 80 Minn. 123, 83 N. W. 32.

⁷⁵ *Edney v. Baum*, 44 Neb. 294, 62 N. W. 461.

⁷⁶ *Ante*, c. 12.

⁷⁷ *First National Bank v. St. Cloud*, 73 Minn. 219, 75 N. W. 1054.

§ 248. Same principle applicable in special proceedings as in actions.

Whenever the trial court has jurisdiction to grant a new trial of a special proceeding, it may grant it on the ground of the insufficiency of the evidence, to the same extent, and subject to the same principles as in civil actions. Thus it was held that the discretion of the trial court to grant a new trial in a condemnation proceeding would not be disturbed, the court saying: "It would be sufficient for us to say that as the order appealed from is one granting a new trial, and as the evidence as to the value of the land condemned is conflicting, the decision of the court below, in the absence of a showing of an abuse of discretion, will not be reversed."⁷⁸

§ 249. No relief without substantial prejudice.

The condition that a party who has not been substantially injured will not be heard to complain applies here as elsewhere. Accordingly, it was held that although a verdict in an action against a railroad company for negligence gave plaintiff nominal damages only, a new trial would not be granted on plaintiff's application, it appearing that evidence warranted a verdict for defendant.⁷⁹ Nor will a new trial be granted, merely to enable a party to recover nominal damages.⁸⁰ Nor can a defendant claim a new trial on the ground that the verdict was for a less amount than plaintiff's evidence entitled him to recover.⁸¹

II. VERDICT OR OTHER DECISION AGAINST LAW.

§ 250. Decision against law as distinct ground for new trial.

An attempt will here be made to explain the meaning of the phrase "against law," and to give a sufficient reason for placing these two grounds for new trial conjointly in the same subdivision. The expression that a verdict or other decision

⁷⁸ *San Diego Land etc. Co. v. Neale*, 88 Cal. 50, 25 Pac. 977.

⁷⁹ *Reeve v. Wilkes-Barre W. V. Traction Co.*, 9 Kulp (Pa.), 182.

⁸⁰ *People v. Petrie*, 191 Ill. 497, 85 Am. St. Rep. 268, 61 N. E. 499, 94 Ill. App. 652, and cases cited. Error in verdict may be so trifling in amount as to warrant court in denying a new trial: *Belt v. Farrow*, 83 Ga. 695, 10 S. E. 357.

⁸¹ *Evans v. Koons*, 10 Ind. App. 603, 38 N. E. 350.

is "against law," in broad literal sense, would seem to imply that the true legal consequence of the verdict or decision conflicts with the conclusion drawn by the court, or against municipal law in its broad sense. And in *People v. Maroney*,⁸² Henshaw, J., delivering the opinion, said: "We are not by this to be understood as declaring that a verdict of guilty, unsupported by any evidence, could not be reversed upon appeal. It could, for such a verdict would be contrary to law, and therefore subject to reversal, because the appeal would present a question of law under the constitution." But it is not used in the California code or in any statute, nor was it at the common-law, in any such sense. In truth, the sense attributed to it by the courts is not supported by any process of sound legal reasoning, but merely by arguments *ab inconvenientia*. Proceeding by a process of negation and exclusion will facilitate an understanding of the term. It has been already fully shown that it is

⁸² 109 Cal. 279, 41 Pac. 1097. It is evident from the report that counsel made the same mistake in *Froman v. Patterson*, 10 Mont. 107, 114, 24 Pac. 692, as was made by Justice Henshaw in this case. They managed to miss the real point at all points of their briefs and argument. The court said: "The whole argument in this appeal on the part of respondent, who seeks a new trial, is based upon two premises: First, that the evidence introduced on behalf of plaintiff is sufficient to sustain his action, and that the evidence introduced on behalf of defendant is insufficient to sustain a finding and decision in his favor. These questions cannot be reviewed in this application for a new trial, because the respondent has not laid the foundation for the consideration by designating the proper grounds, and specifying the particulars wherein the evidence is insufficient. The other premise is that errors of law occurred at the trial, such as are dwelt upon in the 'motion for new trial.' It is palpable that such alleged errors cannot be considered for two reasons: First, because no exceptions were saved at the trial; and secondly, if such exceptions had been saved, the plaintiff gave no notice that he would make 'errors in law occurring at the trial and excepted to by the party making the application' one of his grounds of motion for new trial." Misconstruction of the statute or want of attention in preparation for appeal led to the same serious result in *State v. Gawith*, 19 Mont. 48, 50, 47 Pac. 207, where the court said: "The ground designated in the notice of motion in the case before us, is that 'the verdict is contrary to law and evidence.' So far, therefore, as the motion pertains to the evidence, it must be disregarded at once, as the evidence is not before us. The question remaining, therefore, resolves itself into this: Can this court review the in-

no ground for new trial that a judgment is against law.⁸³ The term cannot be used interchangeably with the ground described by the phrase with which it is connected in subdivision 6, namely, "insufficiency of the evidence to justify the verdict or other decision." In *Brummagin v. Bradshaw*,⁸⁴ the appellant, alleging insufficiency of the evidence to justify the verdict, and that it was against law, separately, sought to meet the objection that the particulars of insufficiency were not specified, and having made his general specification in the language of the statute, urged that the verdict was against law. Upon this point the court said: "If a new trial is sought because the evidence does not support the verdict, it can only be had by assigning, as the ground of the motion, the insufficiency of the evidence, and pointing out in the statement the particulars in which it is insufficient, as required by the statute. It is not enough to aver that the verdict is against law, and then offer

instructions on appeal from the judgment, or from an order denying a motion for a new trial, when the only designation of the ground upon which the motion for a new trial was made, is that 'the verdict is contrary to law?' It would seem as if under any circumstances there should be a more specific designation of the ground relied on than we find in this case (*State v. Black*, 15 Mont. 144, 38 Pac. 674); but, assuming that by changes in the code since *State v. Black*, supra, was decided, the statutory words are not a sufficient designation upon which the court will review the question of whether 'a verdict is contrary to law or evidence,' still the appellant here is not in a position to have the instructions considered by the court, because under a notice of motion designating as grounds for a new trial that 'the verdict is contrary to law and evidence,' the statute does not mean to include the distinct and separate ground of motion enumerated in subdivision 5 of section 2192, which authorizes the court to grant a new trial 'when the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial.' It seems to us that to hold that the instructions may be reviewed on appeal under the sole designated ground that the verdict is contrary to law, would do entirely away with the distinct and separate ground upon which a new trial may be granted when the court has misdirected the jury in a matter of law.'" See, also, *Drexel v. Daniels*, 49 Neb. 101, 68 N. W. 399.

⁸³ Ante, § 250.

⁸⁴ 39 Cal. 24, 34. That verdict or decision against law is a distinct ground for new trial. See *Froman v. Patterson*, 10 Mont. 114, 24 Pac. 692; *State v. Gawith*, 19 Mont. 51, 47 Pac. 207.

to support the averment by showing, that the verdict is not supported by the evidence, and is, for that reason, against law.' If such a course of proceeding was tolerated, all the other specific grounds for new trial, enumerated in the statute, might, for the same reason, be condensed into the one general ground, that 'the verdict is against law,' for, in that general sense, it would be 'against law,' evidently does not intend to include in that phrase all or any of the other several distinct and separate grounds of the motion, which are specified in the act. Whatever may be the class of cases to which that phrase was intended to apply, it is clear that it has no application to cases falling within either of the other subdivisions, into which the grounds for a new trial are divided by the statute. For these reasons this court has no power to review the evidence in this cause, in order to ascertain whether it supports the verdict." It does not mean, or include, errors occurring during the trial, as was intimated in one case by Chief Justice Wallace.⁸⁵

§ 251. Failure to follow instructions.

It is also well settled that erroneous conclusions of law deduced from a verdict or findings do not constitute a decision against law, and that the remedy therefor is by appeal from the judgment.⁸⁶ Of course, this proposition is only applicable

⁸⁵ See principal opinion in *Martin v. Matfield*, 49 Cal. 42. See *Altoona Q. M. Co. v. Integral Q. M. Co.*, 114 Cal. 100, 104, 45 Pac. 1047. The seventh ground for a new trial mentioned in section 657, "error in law occurring at the trial, and excepted to by the party making the application," is not included in and cannot be re-examined upon a specification under the sixth ground that the finding is against law: *Martin v. Matfield*, 49 Cal. 41, 44, per Rhodes, J., concurring. In an opinion written by Mr. Commissioner Haynes, in *Thompson v. Los Angeles*, 125 Cal. 270, 57 Pac. 1015, the court appears to have given assent to the proposition that if the showing that the decision is against law can only be made by the judgment-roll, then the objection cannot be made by motion for new trial. But if it consists in failure to find upon material issues, it is difficult to see how it could otherwise be made to appear.

⁸⁶ *Martin v. Matfield*, 49 Cal. 41, 43; *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636; *Estate of Doyle*, 73 Cal. 564, 15 Pac. 125; *Quinn v. Smith*, 49 Cal. 166; *Sawyer v. Sargent*, 65 Cal. 260, 3 Pac. 872; *Little v. Jacks*, 67 Cal. 165, 7 Pac. 449; *Boston Tunnel Co. v. McKenzie*, 67 Cal. 486, 8 Pac. 22; *Mazkewitz v. Pimentel*, 83 Cal. 451.

to special verdicts. General verdicts are conclusions of both law and fact. In the case of a general verdict the movant for new trial must himself segregate the issues of fact from those of law passed upon by the jury.

In *Altoona Q. M. Co. v. Integral Q. M. Co.*,⁸⁷ the court had expressly directed the jury to find against the plaintiff, and handed to them the form of the verdict which they should render if they found for the plaintiff, but it had also given elaborate instructions submitting the whole case to the jury, some of which stated, hypothetical circumstances warranting a verdict in plaintiff's favor. The verdict was for plaintiff. The trial judge, on motion for new trial, was convinced that he had erred in directing the jury to find a verdict against the plaintiff, but thought, nevertheless, that he was bound upon authority⁸⁸ to grant a new trial, holding that a verdict against an instruction, though erroneous, was a verdict against law. The appeal was from the order granting a new trial. Temple, J., delivering the opinion, said: "This case is not within the reason of that case (referring to the authority cited by the trial court). Here the instructions were in effect contradictory, and the verdict, while opposed to one instruction, is warranted by others." So, it is evident that a verdict is not against law, as contrary to instructions, where the latter are contradictory.

As applied to a verdict in the sense that it is against instructions, in order to warrant the granting of a new trial, it must be clearly so; for if there be a conflict in the evidence and the instruction be broad enough to cover the theory which must have been adopted by the jury in reaching the verdict returned by them, then the verdict cannot be assailed, as being contrary to the instruction, but only, if at all, because contrary to the

23 Pac. 527; *Curtis v. Walling*, 2 Idaho, 416, 18 Pac. 54; *Froman v. Patterson*, 10 Mont. 113, 24 Pac. 692. Insufficiency of findings to support the judgment can be raised only on appeal from the judgment: *Brison v. Brison*, 90 Cal. 328, 27 Pac. 186; *Kirman v. Hunnewell*, 93 Cal. 526, 26 Pac. 124. It was held otherwise in *Simmons v. Hamilton*, 56 Cal. 493, 495, but that case has been practically ignored and repudiated, it has never been followed and is in direct conflict with all subsequent decisions on the subject.

⁸⁷ 114 Cal. 100, 104, 45 Pac. 1047.

⁸⁸ *Emerson v. Santa Clara County*, 40 Cal. 343.

weight of, that is, unsupported by, the evidence.⁸⁹ And in order that a verdict be assailable as "against law," as being against instructions, it must be clearly within the scope and meaning of instructions, and contrary thereto. And it must be contrary to the instructions and also unsupported by the evidence in order to be assailable on this ground. If it merely violate principles of law outside the instructions, though unsupported by the evidence, the proper ground of the motion is insufficiency of the evidence.⁹⁰

§ 252. Why insufficiency of evidence and "against law" placed in same subdivision.

The reason for placing these two grounds in the same subdivision has not been discovered in any decision nor any explanation thus far attempted; still the reason appears clearly inferable from the fact that where a verdict is against law, as violative of instructions, it must be, as above shown, also unsupported by the evidence, and these two grounds coexist. But this coincidence does not hold good throughout. The objection that a verdict or decision is unsupported by evidence may often be maintainable in the absence of any ground for the other objection, and vice versa. As to the first of the above propositions, we may illustrate by a supposable case. We will suppose that A sues B for the price of a horse and simply testifies to the sale, delivery, and price, and rests, and B testifies, under a good and sufficient answer, to making full payment, to which there is nothing by way of rebuttal or contradiction. Suppose on this evidence, B being clearly entitled to a verdict, the court instructs in his favor, but the jury return a verdict for plaintiff. It is clear that the verdict is against law. It is also clear that the verdict is contrary to, that is unsupported by, evidence, in which there is no conflict. But now we will suppose the same case tried by the court, the evidence being the same, and the court to find simply that the sale and delivery were made at a stated price, and to stop there, with a conclusion of law in favor of the plaintiff. The decision would

⁸⁹ *Spect v. Gregg*, 51 Cal. 202.

⁹⁰ *Brummagin v. Bradshaw*, 39 Cal. 24, 35. See *Reed v. Bemal*, 40 Cal. 630, also holding that this rule holds good in the absence of conflict in the evidence.

be against law because the material issue of payment was not passed upon but the decision in so far as it may be called such, is supported by the evidence, upon inspection of all the evidence, however, it is apparent that the court made its finding upon only part of the evidence, also that, in view of the issues and all the evidence, the decision should have been different. Nevertheless, a motion for new trial cannot be here based upon the insufficiency of evidence because the evidence of the payment supports a proposition which, though proper for a finding, yet, upon which there is in fact no finding, and a motion on that ground is premature. A new trial will never be granted for insufficiency of evidence unless there be a finding, verdict, or other decision upon the fact to prove which it is claimed the evidence is insufficient.⁹¹ Taking the foregoing issue and making a slight change, let it be supposed that A gives testimony denying B's testimony of payment, and other evidence be introduced on both sides. Here then is a substantial conflict warranting the jury in finding either way. Here it is impossible to conceive of a verdict against law, if limited to the issue of payment, that is against instructions. Still, if the court is of the opinion that the evidence preponderate against the verdict, it may set aside the verdict and grant a new trial, and of course a motion may be made on the ground of insufficiency of the evidence. The court would have the same discretionary power if after considering a motion for new trial it were not satisfied with findings made by the court, based on such conflicting evidence.

§ 253. Failure to find on material issues.

In cases of trial by the court of issues of fact, without a jury, there are no instructions. The term "against law," has been often declared applicable to cases where the court either has declared its conclusion of law without any findings whatever, and without a waiver of findings, or having undertaken to make findings, has failed to find upon one or more material

⁹¹ *Martin v. Matfield*, 49 Cal. 41, 45, the court saying: "The fourth ground is that there is no evidence that the defendant, Alice Matfield, was not a beneficiary of the money for which said note and mortgage were given. The answer to this point is that the finding does not state that fact; and therefore, it cannot be said that the finding of that fact is not sustained by the evidence."

issues or questions of fact.⁹² And a new trial should be granted where it is uncertain what the court has in fact found. Accordingly, where the findings were not sufficiently certain to show whether an action for claim and delivery was decided upon the theory that plaintiff was not the owner of the property in any sense, or upon the theory that a sale of the property to the plaintiff was void as against creditors for want of delivery and an immediate and continued change of possession, it was held a new trial should be granted.⁹³ It was, in effect,

⁹² Knight v. Roche, 56 Cal. 17; Brown v. Burbank, 59 Cal. 535; Soto v. Irvine, 60 Cal. 436; Cummings v. Conlan, 66 Cal. 414, 5 Pac. 796, 903; Spotts v. Hanley, 85 Cal. 168, 24 Pac. 738; Langan v. Langan, 89 Cal. 195, 26 Pac. 764; Nuttall v. Lovejoy, 90 Cal. 168, 27 Pac. 69; Brison v. Brison, 90 Cal. 328, 27 Pac. 186; Adams v. Helling, 107 Cal. 301, 40 Pac. 422; Haight v. Tryon, 112 Cal. 6, 44 Pac. 318; Benjamin v. Levy, 39 Minn. 11, 38 N. W. 702. It seems that in Indiana a failure to find upon a material issue is regarded as equivalent to an implied finding that the fact alleged and denied is not proven and that the motion should be on the ground that the decision is against the evidence. See Gray v. Taylor, 2 Ind. App. 155, 28 N. E. 220. "Whatever else may be meant by the expression 'decision against law,' we think there is no doubt that it includes a case where the decision is based upon findings which do not determine all of the material issues of fact raised by the pleading": Knight v. Roche, 56 Cal. 18. In such case a re-examination of the facts of the case becomes necessary in order that the issues of fact may be determined: Knight v. Roche, 56 Cal. 17; Soto v. Irvine, 60 Cal. 438. That court may make additional findings before entry of judgment, and thus obviate a new trial. See Hayes v. Wetherbee, 60 Cal. 396, 399; Pratalongo v. Larco, 47 Cal. 378; Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213; Bosquett v. Crane, 51 Cal. 505. "While it is true that the court cannot change its findings after the entry of judgment without granting a new trial, and doing it upon new trial, it does not follow that it may not make such modification a correction of its findings before judgment as shall make them conform to the truth and cover the issues in the cause": Smith v. Taylor, 82 Cal. 533, 544, 23 Pac. 217.

⁹³ Banning v. Marleau, 101 Cal. 238, 35 Pac. 772; Nuttall v. Lovejoy, 90 Cal. 163, 167, 27 Pac. 69. In the second of these cases the court said: "It is claimed that the plaintiff was not entitled to a new trial, on the ground that the decision is 'against law,' and in support of his contention appellant Hall cites cases holding that a new trial cannot be granted upon the ground that the conclusions of law are not supported by the findings of fact. This may be conceded. The question here is, not whether the court below

held in *Hathaway v. Ryan*⁹⁴ that the remedy for a failure to find a material fact was ground for exception and direct appeal, and that it was only where the court found upon a material fact contrary to or without sufficient evidence that a new trial was proper. But in view of numerous decisions recognizing the principle as above stated, this case cannot be considered as acceptable authority. And lest perchance some exceedingly credulous attorney or young law student should be misled by it, it is entirely proper to give warning against an expression used in an opinion by Commissioner Chipman, adopted by the court, in *Churchill v. Flourney*,⁹⁵ in these words: "The failure to pass upon a material issue is no ground for granting a new trial." Where findings upon a material issue are contradictory, the effect is the same as if there were an entire failure to find upon such issue, and a new trial should be granted on the ground that the decision is against law.⁹⁶

In some of the cases it has been stated, and in others it has been assumed, that findings outside the issues constitute a decision against law.⁹⁷ But unless, in addition to such find-

erred in its conclusions of law but whether the findings fail to dispose of some material issue. As between the plaintiff and defendant Hall, the question as to the character of the land—whether it was suitable or unsuitable for cultivation—was a material issue. That issue has been disposed of, because the findings are so inconsistent and contradictory that it is impossible to tell therefrom whether the land is or is not suitable for cultivation. When the findings do not determine all the issues raised by the pleadings with respect to which evidence was introduced, the decision is against law, and a new trial may be granted on that ground."

⁹⁴ 35 Cal. 187. This case was cited and followed in *Welland v. Williams*, 21 Nev. 230, 234, 29 Pac. 403.

⁹⁵ 127 Cal. 355, 361, 59 Pac. 791. In view of the fact that the above quotation is not supported by the authority cited, and that the contrary is, and has for centuries been held to be the law, in all jurisdictions, it is not necessary to discuss the matter seriously. In one of the cases cited by the commissioner (*Brison v. Brison*, 90 Cal. 323, 328, 27 Pac. 186), while the court held the case of *Knight v. Roche*, 56 Cal. 15, inapplicable, yet gave sanction to its doctrine in all cases where a material and essential issue was not passed upon.

⁹⁶ *Langan v. Langan*, 89 Cal. 186, 195, 26 Pac. 674; *Nuttall v. Lovejoy*, 90 Cal. 163, 167, 27 Pac. 69.

⁹⁷ See *Marshall v. Golden Fleece Min. Co.*, 16 Nev. 156, 173. In this case the court contrary to the sound doctrine of the other cases

ings, there is also a failure to find on disputed facts which are material, it is clear that the case does not come within the rule above stated. Findings outside the issues need not be considered for any purpose whatever.

Where all the material facts are admitted by the pleadings, such admissions being equivalent to findings, but nevertheless, the court makes findings contradictory to such admitted facts, and enters judgment in conformity with such findings, the remedy for such erroneous judgment is by appeal. Such judgment will be treated as an erroneous judgment unsupported by what stands for the real and correct findings, namely, the admitted allegations, which need not be expressly found by the court. In *Matter of Doyle*,⁹⁸ the court said: "When a

cited herein. said: "From the foregoing, as well as upon reason, we conclude that, if the decision or finding of a court or referee is against law, a new trial is the proper remedy, and that the decision is against law if it is contrary to, or inconsistent with, the case made and embraced within the issue." In *Shepard v. McNeil*, 38 Cal. 74, when a new trial was granted "on the ground that the plaintiff has entered a personal judgment against defendant," the court said: "Besides, it is no ground for a new trial of the issues of fact, that the judgment is broader than the facts alleged and found would justify. Such an error in no way affected the findings. The error occurred in entering the judgment subsequent to the findings. It did not occur in the course of the trial, but afterward and it is, therefore, not one of the grounds for a new trial. There is no complaint that the findings were incorrect in this particular. The point is not specified in the statement as a ground for new trial. If there was any error in entering the judgment, the defendants have their remedy by appeal from the judgment itself on the judgment-roll. The order granting a new trial on the ground stated is erroneous."

⁹⁸ 73 Cal. 564, 570, 15 Pac. 125. To same effect, *Ortega v. Cordero*, 88 Cal. 221, 228, 26 Pac. 80; *Nuttal v. Lovejoy*, 90 Cal. 163, 167, 27 Pac. 69. In *Ortega v. Cordero*, supra, it was insisted that, although a finding be contradictory to an admission in the pleadings, yet it must be assumed that it was based upon evidence. A similar case was that of *Burnett v. Stearns*, 33 Cal. 469, where it was said: "The findings should be confined to the facts in issue. The province of the court in respect to facts is to determine, but not raise, issues. It is insisted, on the other side, that it will be presumed the court found the fact in question from competent evidence. The answer is, it would not be presumed that evidence was introduced to contradict the admission of record." This case is affirmed in

trial is had by the court without a jury, a fact admitted by the pleadings should be treated as 'found.' It has been repeatedly held that the court need not expressly find a fact averred in the pleading of one party and not denied by the other. If the court does find adversely to the admission, such findings should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings. The mere finding by the court against an averment not denied does not create an issue which a party has a right to have tried. Here the appellant asked for a second trial of a suppositive issue, on the ground that there was no issue which the court had right or power to try the first time. Where all the material issues made by the pleadings are determined by the findings, and the findings are not attacked as unsustained by the evidence, a party cannot demand a new trial upon the ground the court erroneously applied the law to the facts, or drew the wrong conclusion of law, from the facts found. The remedy in such case is by appeal. The code does not contemplate or provide for a new trial or 're-examination' of issues of fact, the findings upon which are indisputably correct. . . . The rule must be the same where, as the appellant claims is the case here, the material allegations in the pleading of one party are not denied by the other. In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not upheld by the admitted facts is erroneous."

§ 254. Verdicts against law.

With reference to failure to find upon material issues submitted to them, the same rule is usually applied to decisions

Gregory v. Nelson, 41 Cal. 279, where among other things it is said: "This court cannot presume that the trial court required or permitted evidence to be introduced on the trial for the purpose of establishing or rebutting allegations of the complaint not denied by the answer; nor can it be presumed that any evidence was received by the trial court, except such as was pertinent to the issues made or tendered by the pleadings, and evidence tending to rebut such legitimate evidence." To the same effect are the following cases: Hicks v. Murray, 43 Cal. 515; Bradley v. Cronise, 46 Cal. 287; Estate of McKinley, 49 Cal. 152; McDonald v. Homestead Assn., 51 Cal. 210; Hill v. Den, 54 Cal. 20; Tracey v. Craig, 55 Cal. 91; Silvey v. Neary, 59 Cal. 97; Campe v. Lassen, 67 Cal. 139, 7 Pac. 430.

by juries (verdicts) as where the case is tried by the court without a jury. It is the duty of the court, however, to have defective or incomplete verdicts corrected or completed under its direction, and even where that is not done, it, in strict legal sense, amounts to a mistrial, necessitating a retrial as of course. But in practice such verdicts are often treated as verdicts against law and proper subjects for motion for new trial on that ground. Thus, where it was impossible to ascertain from the verdict, considered in connection with the instructions, whether the jury found that the defendant was present actively participating in the act constituting the crime or found that he was guilty as an aider and abettor, not being present, and the evidence was insufficient to sustain a conviction on the latter theory, a new trial was directed.⁹⁹ And on the same principle, where, upon an information charging assault with intent to commit murder, the jury returned a verdict of guilty of assault with a deadly weapon, this was held to constitute a failure to pass upon the issue submitted to them, that it was a verdict against law, entitling the defendant to a new trial. But a more serious consequence resulted to the prosecution than the mere order for a new trial. The trial court should have refused to receive the verdict and have directed the jury to retire and further consider with a view to returning a verdict upon the issue actually submitted to them. Having failed to do so, and having discharged them without the consent of the defendant, it was held upon a second appeal that his plea of once in jeopardy, set up on another trial, should have been sustained, and his discharge by the lower court was ordered.¹⁰⁰ An excellent illustration of the rule as applied to decisions by juries was furnished in a Minnesota case,¹⁰¹ where in an action to recover a balance on a contract for the construction of an electric plant in defendant village, the main issue was over a counterclaim based on a time clause in the contract. The court submitted for answer several questions in reference to this issue. The jury returned a general verdict for plaintiffs, but could not agree as to the special questions, and failed to an-

⁹⁹ *People v. Schoedde*, 126 Cal. 373, 376, 58 Pac. 859.

¹⁰⁰ *People v. Arnett*, 126 Cal. 580, 59 Pac. 204; S. C., 129 Cal. 306, 61 Pac. 930.

¹⁰¹ *Elliott v. Village of Graceville*, 76 Minn. 430, 79 N. W. 503.

swer any of them. It was held that it was proper to grant a new trial on the ground that, without agreeing as to the special questions, the jury could not return a general verdict in plaintiffs' favor. And where plaintiff, in trover, elected to take an alternative verdict for the property sued for, or its value, as provided by statute, and the court instructed the jury to render an alternative verdict, and the jury having rendered a verdict simply for the property, it was held a new trial should be granted.¹⁰² So, where the special questions submitted to the jury were evasively and unfairly answered, and some of the findings made thereon were unsupported by the testimony, it was held a new trial should be ordered,¹⁰³ and the same conclusion was reached where special findings by the jury were in substantial conflict with each other on vital questions in the case.¹⁰⁴ And where there is a party plaintiff or defendant in whose favor or against whom judgment may be entered, regardless of the rights of those with whom he is joined, the verdict should expressly declare in favor of or against such party. The verdict in such case is not simply informal or defective in matters that the plaintiff is bound to have corrected at the trial or deemed to have waived the defect.¹⁰⁵ A verdict

102 *St. Louis etc. Ry. v. Clark*, 48 Kan. 321, 329, 29 Pac. 312.

103 *Bradley v. Burkett*, 82 Ga. 255, 11 S. E. 492.

104 *State v. White Oak River Corp.*, 111 N. C. 661, 16 S. E. 331; *Chicago etc. Ry. Co. v. Williams*, 59 Kan. 700, 54 Pac. 1047; *Bank of Topeka v. Miller*, 59 Kan. 743, 54 Pac. 1070; *Kansas City v. Brady*, 53 Kan. 312, 36 Pac. 726. Mere technical conflict between special findings of no consequence where taken together they support the general verdict; *Anthony v. Atwood*, 10 Kan. App. 578, 62 Pac. 720, where the general verdict was in plaintiff's favor, and the special findings made by the jury were supported by the evidence and were inconsistent with each other, or consistent with each other and inconsistent with the general finding, but not destructive, of plaintiff's right of recovery, it was held a new trial should be ordered, and not judgment entered for defendant: *Anderson v. Pierce*, 62 Kan. 756, 64 Pac. 633. Plaintiff alleged title to two entire tracts and proved title to one-seventh only, of one and the first issue submitted to the jury was, "Is plaintiff the owner of the land described in the complaint?" and the answer returned was "Yes. One-seventh of the sandy bottom tract—160 acres," it was held that the finding being contradictory a new trial should be granted: *Allen v. Sallinger*, 105 N. C. 323, 10 S. E. 1020.

105 *Rankin v. Central Pac. R. R. Co.*, 73 Cal. 93, 15 Pac. 57. See,

contrary to an instruction of the court upon a point of law is a verdict against law.¹⁰⁶ Nor do the courts discriminate here in between erroneous and correct instructions.¹⁰⁷ In *Trenor v. Central Pac. R. R. Co.*,¹⁰⁸ the court said: "It is settled here that when an instruction, even incorrect in point of law, is given by the trial court, it is the duty of the jury, in their deliberations, to observe it, and if they disregard it, there must be a new trial." In *Murray v. Heinze*,¹⁰⁹ after citing and discussing authorities, the court said: "This is the first time it has been seriously contended in this court that the jury have the right to determine the law in an ordinary suit at law, and to absolutely disregard the instructions of the court, on the ground that, in the opinion of the jury, the instructions of the court are erroneous. If the contention of the appellant is to be upheld, what may we not anticipate as the result in the administration of the law in this state? If the jury may rightfully invade the province of the court, why may not the court retaliate by invading the province of the jury, and determining questions of fact? As counsel for the respondent suggest, if the contention of appellant is correct, then, logically, there is an appeal in all cases upon questions of law from the trial court to the jury. And, as counsel for respondent further sug-

also, *Jenkins v. Parkhill*, 25 Ind. 473; *Settle v. Allison*, 8 Ga. 208, 52 Am. Dec. 393.

¹⁰⁶ *Emerson v. Santa Clara County*, 40 Cal. 543, 545; *Declez v. Save*, 71 Cal. 552, 12 Pac. 722; *Aguirre v. Alexander*, 58 Cal. 21, 30; *Sweeney v. Central Pac. R. R. Co.*, 57 Cal. 15; *Helbing v. Svea Ins. Co.*, 54 Cal. 159, 35 Am. Rep. 72, n.; *Loveland v. Gardner*, 79 Cal. 321, 21 Pac. 766; *Marriner v. Dennison*, 91 Cal. 555, 27 Pac. 927, 1091; *Beaseley v. San Jose Fruit Packing Co.*, 92 Cal. 391, 28 Pac. 485; *Mattingly v. Pennie*, 105 Cal. 517, 45 Am. St. Rep. 87, 39 Pac. 200; *Gier v. Los Angeles etc. Electric Ry. Co.*, 108 Cal. 129, 41 Pac. 22; *Murray v. Heinze*, 17 Mont. 353, 364, 42 Pac. 1057, 43 Pac. 714; *Hoffman v. Bosch*, 18 Nev. 360, 4 Pac. 703; *Drew v. Watertown Ins. Co.*, 6 S. Dak. 339, 61 N. W. 34; *Pepperell v. City Park Transit Co.*, 15 Wash. 181, 45 Pac. 743, 46 Pac. 407.

¹⁰⁷ *Emerson v. Santa Clara Co.*, 40 Cal. 543, 545; *Aguirre v. Alexander*, 58 Cal. 21, 30; *Trenor v. Central Pac. R. R. Co.*, 50 Cal. 222, 233; *Murray v. Heinze*, 17 Mont. 353, 364, 42 Pac. 1057, 43 Pac. 714.

¹⁰⁸ 50 Cal. 222, 233.

¹⁰⁹ 17 Mont. 353, 364, 365, 42 Pac. 1057, 43 Pac. 714.

gest in their argument, if the jury may determine the law an attorney arguing a case may say to the jury: 'The court will charge you that the law is so and so, but I say to you the court is wrong. You, the jury, are the judges of the law, and may determine it for yourselves.' Would any court permit such an argument to a jury? Certainly not. But if the jury are the judges of the law, why should a court prohibit such an argument to them? If a juror should state upon his voir dire that he would not be governed by the law as declared by the court if he thought the instructions erroneous, nobody would doubt that he would not be permitted to sit in the case. Yet, if he has the right as a juror to determine the law, we do not see why he should not be challenged for asserting that right. If the contention of appellant is correct, the time of this court in hearing future appeals will be devoted to determining whether the court or the jury were right in their views of the law in the trial of the cause in the lower court. Authority or no authority, we cannot give our sanction to a practice that would lead to such results. Such a course would ultimately result in overturning our system of keeping separate and distinct the powers and duties of courts and juries, confining each to its own proper province, in the degradation of the courts, and confusion and chaos in the administration of the law. Such calamities are much more to be deplored than the inconvenience and costs of a new trial in cases where juries usurp the powers of the court, which seem to exercise the counsel for the appellant in this case." It will be observed that this argument proceeds exclusively *ab inconvenientia*. No stronger argument than the foregoing has ever been advanced in favor of the doctrine. It is little wonder that its assertion and support in decisions has been strenuously opposed in dissenting opinions. The supreme court of Missouri has refused to adopt it.¹¹⁰ Crockett, J., in the *Emerson v. Santa Clara County*

¹¹⁰ *Bartley v. Metropolitan Ry. Co.*, 148 Mo. 124, 49 S. W. 840; *Homuth v. Metropolitan St. Ry. Co.*, 129 Mo. 629, 31 S. W. 903. A verdict pursuant to an improper instruction is not a verdict "contrary to law" ("contrary to," or "unsupported by" the evidence explained): *Swartout v. Willingham*, 26 N. Y. Supp. 769, 31 Abb. N. C. 66. In *Edwards v. Wagner*, 121 Cal. 376, 53 Pac. 821; *Garoutte, J.*, concurred in these words: "I add my special concurrence to the views of Mr. Justice Harrison, expressed in the foregoing opinion

case in a dissenting opinion said: "A majority of the court holds that the verdict should be set aside, and a new trial awarded, because the verdict should be contrary to the instruction of the court, even though it be conceded that the instruction be erroneous, and the verdict was in all other respects proper; and that, too, notwithstanding the court below was satisfied with the verdict, and refused to disturb it. I dissent from this conclusion. I concede, to the fullest extent, that it is the duty of the jury, to take the law from the court, and if they violate that duty, and find a verdict contrary to an instruction, it should be set aside, unless it clearly appears, that the verdict was in other respects proper and that the losing party has suffered no injury by reason of a disregard by the jury of the instruction of the court. Perhaps the injury would be presumed, unless the contrary clearly appeared. But when it is apparent, as in this case, that the instruction was erroneous, and ought not to have been given, and that the verdict was in other respects proper, and that the party has suffered no injury, and particularly, when the court which tried the cause is satisfied with the verdict, I can perceive no valid reason, why this court should set aside the verdict, and remand the cause, in order that the district court may go through the form of another trial, to result in similar verdict and judgment. It is the province of the appellate court to correct such errors as resulted or may have resulted in an injury to the appellant; but when it clearly appears that no injury has, or could have resulted from the error complained of, it is the constant practice of this court, to refuse to disturb the judgment." Still the prevailing view, where accepted, as it is in a majority of states, is now too firmly established to be shaken by criticism.¹¹¹

for the reason that I have never considered as sound law the doctrine laid down in *Emerson v. Santa Clara County*, 40 Cal. 543."

¹¹¹ For additional authorities in favor of granting new trial in such cases, see *Crane v. Chicago etc. Ry. Co.*, 74 Iowa, 330, 7 Am. St. Rep. 479, 37 N. W. 397; *Distad v. Shanklin*, 11 S. Dak. 1, 75 N. W. 205; *Standiford v. Green*, 54 Neb. 10, 74 N. W. 263; *Lehr v. Brodbeck*, 192 Pa. St. 535, 73 Am. St. Rep. 828, 43 Atl. 1006. In an action for the contract price of a heating apparatus defendant alleged that plaintiffs had misrepresented its merits and capabilities, and prayed for a recovery of advances made to plaintiff on the apparatus. The judge charged that, if plaintiff had made the

But the rule does not apply where there is a substantial conflict of evidence upon the point to which the instruction which is alleged to be disregarded applies. In other words, a verdict cannot be said to be against law, as contrary to the instructions of the court, because inconsistent with the facts as maintained by one party, if the jury might, upon the evidence, have decided the question of fact contrary to such party and consistently with the instructions.¹¹²

misrepresentations alleged by defendant, defendant was entitled to recover for his advances; but that if no such misrepresentations were made, the jury should return a verdict for plaintiff for the contract price. It was held, the jury having returned a verdict against plaintiff, without allowing defendant for his advances, the trial judge properly granted a new trial: *Smith (H. B.) Co. v. Chapin (City Court)*, 13 N. Y. Supp. 799. In *Edwards v. Wagner*, 121 Cal. 376, 53 Pac. 821, the verdict being in violation of an instruction which was held erroneous, it was held that there should be no reversal, because "the jury would not have been justified (according to the opinion of the writer of the opinion) in rendering a verdict except in favor of the defendant." "The legal proposition invoked in support of this view is that: "A judgment will not be reversed or a new trial granted for mere error, when it clearly appears that the appellant has sustained no injury therefrom," citing *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386. The proposed support is sound law, but not applicable to the reason assigned for affirmance. The judgment of affirmance was fully warranted for reasons overlooked by the learned associate justice, writing the opinion.

¹¹² *Northern Ry. Co. v. Jordon*, 87 Cal. 23, 25 Pac. 273. A verdict which is more favorable to defendant than is warranted by the evidence and instructions, but which is within the province of the jury to find is not in any sense contrary to law: *People v. Jamarillo*, 57 Cal. 111.

CHAPTER 14.

ERRORS IN IMPANELING JURY.

- § 255. Disqualification of jurors available in two forms.
- § 256. Latitude of voir dire examination.
- § 257. Statutory exceptions where challenge for actual bias.
- § 258. Grounds of objection to juror must be specifically stated.
- § 259. Error in ruling upon evidence upon voir dire examination.
- § 260. Proper practice in civil cases under the codes.
- § 261. Error in ruling on objections to panel.
- § 262. Duty to exhaust peremptory challenges.
- § 263. Right of party to full panel before exercising right of challenge.

§ 255. Disqualification of jurors available in two forms.

It has been elsewhere shown that for concealed disqualification a party may, in some jurisdictions, move under the head of irregularity of the jury. It was further shown, however, that views greatly diverge on the subject, and that in a majority of the states concealed disqualification constitutes no ground for new trial.¹ But the voir dire examination may disclose such facts as, in the opinion of the party, constitutes disqualification, and the court may entertain a different opinion and overrule the challenge. If herein the court errs, an exception having been preserved, the party may obtain a new trial or a reversal as for error in law during the trial.

In *People v. Wong Ark*,² Justice Garoutte, in a concurring opinion said: "The decision of the court upon the challenge of a juror for actual bias in many instances is a decision of a matter of law, and in all such cases there is an appeal to this court given by the constitution. If a juror, upon his voir dire, should state that the accused was his enemy, and such a fact would affect his verdict if taken as a juror, no issue of fact

¹ See chapters 5 and 9.

² 96 Cal. 125, 139, 30 Pac. 1115.

would be created; no question of the court's discretion would be involved; but the decision upon a challenge for actual bias based upon such conditions would be a decision upon a question of law. From the existence of such a state of facts, it would follow as matter of law, that the juror was incompetent to act."

In *Holt v. People*,³ Justice Cooley said: "Here the juror was himself placed upon the stand, and a single question was put to him. It was upon his reply to that question that the judge's decision was based. The facts were undisputed, and the question of their sufficiency as a cause for challenge was purely a question of law. The decision of the judge upon that question is as fairly presented for review by the exception thereto as if the judge had proceeded to find the facts in the words of the juror, and had then spread upon the record his conclusion that the state of mind in the juror thus found was not, as a matter of law, a ground for disqualification."

Circumstances may constitute error in a ruling by which a competent juror is discharged; but such circumstances are of rare occurrence. In *State v. Murphy*,⁴ Chief Justice Dunbar, delivering the opinion said: "It is generally contended that a different rule should obtain in discharging a juror where his competency is called in question, than the rule which should govern in retaining him. No possible harm, at least no harm that rises above a little temporary inconvenience or additional costs, which ought not to be seriously considered where a citizen is on trial for his life or liberty, can be done by discharging the juror, but very grave harm may come from retaining him." And in *State v. Miller*,⁵ the court said: "We can hardly see how the court could commit substantial error by discharging any person from the jury, when twelve other good, lawful, and competent men could easily be had to serve on the jury. There is an immense difference between discharging a juror, and retaining him. To discharge can seldom, if ever, do any harm; while to retain him, if his competency is doubtful, may do an immense injury to one party or the other."

The supreme court of California gave full expression on the general subject in *Lombardi v. California St. Ry. Co.*,⁶ as fol-

³ 13 Mich. 227.

⁴ 9 Wash. 204, 215, 37 Pac. 420.

⁵ 29 Kan. 43.

⁶ 124 Cal. 311, 316, 57 Pac. 66.

lows: "Does this examination show 'the existence of a state of mind in the juror evincing' a bias in favor of the plaintiff? If so, is this ground of challenge removed or overcome by the statement of the juror that if the evidence was against the plaintiff that he would go against him; that 'he would go according to the evidence of the court,' and the other similar statements? That the juror was candid, honest, and sincere in all his statements is beyond question; and any such man, if compelled to serve as a juror, would, to the best of his ability, decide according to the evidence and the instructions of the court. When pressed with questions of that character he could only reply as he did. If he had said 'No, I will decide for my friend whatever may be the evidence,' he would have shown himself to be a man who would not even try to do right. It may be that some men may be just and impartial toward an enemy, or even remove from their minds and memory and heart all the leanings, inclinations, and desires that so naturally draw them to the side of a friend. But the statute makes no exceptions. It does not add the qualifications: 'But if the juror will swear that he can impartially try the case, notwithstanding his bias toward his friend, or his prejudice against his enemy, the challenge shall be disallowed.' It is apparent that such an addition to the statute would make a material change; but can the court, by any line of examination it may see proper to permit, thus change it? Doubts that a juror may entertain as to the weight, effect, or credibility of the evidence are not to be resolved by the ties or persuading influence of friendship, but by the declared and impartial rules of the law." But the case just cited illustrates the proposition that a party is entitled to jurors who stand unbiased upon every feature and issue of the case, and the failure to protect such right to the full extent in rulings upon challenges may result in error, entitling the party to a reversal, or new trial. The record shown in the report is too lengthy for insertion here, but thereon the court said: "But if the jury should find that the plaintiff was entitled to recover, still another question remained—the amount of compensation to which he should be entitled. Upon this question he announced that he 'would go to the biggest verdict.' Suppose the defendant had conceded its

liability, and the sole question for the jury was to ascertain the amount of damages the defendant should pay; would this juror have been accepted by the court, even in the absence of a challenge, or, if challenged, would the court have hesitated to sustain it? Yet the defendant was as much entitled to an impartial jury upon this branch of the case as the other, and should not be compelled to submit its case to a juror who, before he heard the evidence, declared that if the plaintiff should be entitled to recover, he 'would go to the biggest verdict.'"

§ 256. Latitude of voir dire examination.

For the purpose of showing a disqualifying relation or condition of mind, considerable latitude of examination upon voir dire is permissible. A case illustrative of the liberality of courts herein was that of *People v. Reyes*,⁷ where several questions were propounded with the view to eliciting proof of membership of a proposed juror in a secret organization, hostile to foreigners, the defendants being citizens of Mexico. In reversing the judgment and remanding the case for new trial the court said: "To ascertain whether a bias exists in the mind of the juror, resort must be had to his declarations to others, or to his sworn statements when interrogated. As the juror best knows the condition of his own mind, no satisfactory conclusion can be arrived at without resort to himself. Applying this test then, how is it possible to ascertain whether he is prejudiced or not, unless questions similar to the forgoing are propounded to him? He is charged with belonging to a secret association, and with being, a member of such association, under obligations which might create a prejudice against foreigners who may reside in the country. To ascertain that fact, and in order to purge the juror of the charge of bias, he is asked the question, 'Have you at any time taken an oath, or other obligation of such a character, that it has caused a prejudice in your mind against foreigners?' This certainly was not an impertinent question in a cause where foreigners were parties, whatever reasonable effect it might have upon the minds of the triers. The person might have answered that he held a political prejudice against foreigners, but he entertained no bias which would lead him to deny to foreigners a fair trial, and a just and im-

⁷ 5 Cal. 347.

partial administration of the law. Prejudice, being a state of mind more frequently founded in passion than in reason, may exist with or without cause; and to ask a person whether he is prejudiced or not against a party, and (if the answer is affirmative) whether that prejudice is of such a character as would lead him to deny the party a fair trial, is not only the simplest method of ascertaining the state of his mind, but is probably the only sure method of fathoming his thoughts and feelings. If the person called had not taken an obligation which would prejudice him against foreigners in such a manner as to imperil their rights in a court of law, he could say so, and question and answer would be harmless. If, upon the other hand, he had taken oaths, and was under obligations which influence his mind and feelings in such a manner as to deny to a foreigner an impartial trial, he is grossly unfit to sit as a juror, and such facts should be known." The above mentioned case has been freely cited and its doctrine approved by the courts in several other states.⁸ No attempt has been made in California to improve upon the exposition of the law governing the subject by the court in that case.

The right to freely examine jurors touching their qualifications is specially important in criminal cases, since under the provisions of the Penal Code, as is well settled by the courts of a majority of the states, concealed disqualification cannot be made the basis of a motion for new trial.⁹ And the right

⁸ See *Pinder v. State*, 27 Fla. 375, 26 Am. St. Rep. 78, 8 South. 837, approving *People v. Reyes* as stating the proper practice; *Lavin v. People*, 69 Ill. 305; *State v. Mann*, 83 Mo. 599; *State v. McAfee*, 64 N. C. 341; *State v. Boyle*, 104 N. C. 835, 10 S. E. 696, 1023. In *Purple v. Horton*, 13 Wend. 10, 27 Am. Dec. 167, the triers, after hearing the testimony of Royal Arch Masons, as to the obligations they were under, held that a Royal Arch Mason was a competent juror to sit in a cause where a Mason was a party against a person who did not belong to the Masonic fraternity.

⁹ The value of a searching examination of a proposed juror upon his voir dire examination is thus shown in the court's language in *State v. Murphy*, 9 Wash. 211, 37 Pac. 420. "The first case cited by the respondent to sustain his contention that the juror was competent is *Holt v. People*, 13 Mich. 228. There the answer of the juror was, 'I have formed a partial opinion as to the guilt or innocence of the defendant from rumors heard in the street, but not a positive opinion.' Upon this statement, respondent's counsel challenged

to except and to have the ruling of the trial court upon a challenge for actual bias is attempted to be taken away by section 1170 of the Penal Code; but that section, to that extent, has been declared unconstitutional.¹⁰

the juror for cause, and without further examination the challenge was overruled; and the court, after commenting on the fact that under the present conditions of society it was frequently impossible for jurors to come to the investigation of criminal charges with minds entirely unimpressed with what they may have heard in regard to them, or entirely without information concerning them, sustained the lower court on the ground that his mere statement did not disqualify him, but stated that further inquiries might possibly have shown that it was of a nature to constitute disqualification; but as the defendant did not see fit to make them, and as the prosecution was not called upon to enter on the investigation if the defendant left it imperfect, and before he had a *prima facie* cause for exclusion, that they would not interfere with the discretion of the judge.”

10 See able concurring opinion of Garoutte, J., in *People v. Wong Ark*, 96 Cal. 125, 129, 30 Pac. 1115, adopted as opinion of court in *People v. Wells*, 100 Cal. 227, 231, 34 Pac. 718. See, also, *People v. Fredericks*, 106 Cal. 554, 559, 39 Pac. 944. The learned associate justice said in part: “It is insisted by appellant that the court erred to the prejudice of his substantial rights during the formation of the jury, by overruling his challenge to certain jurors upon the ground of actual bias, to wit, the existence of a state of mind on the part of the jurors in reference to the case and to the defendant, which would prevent him from acting with entire impartiality, and without prejudice to the substantial rights of the defendant. The appellant excepted to the order of the court denying his challenge, and now asks that such ruling be reviewed. The accused exhausted all the peremptory challenges given him by law, and these men whose competency as impartial jurors is now attacked formed part of the jury which rendered the verdict. We are met at the threshold of the examination by the objection that under section 1170 of the Penal Code, supported by a long line of decisions, there is no exception allowed to a defendant from a ruling of the court denying a challenge for actual bias, and that consequently there is no appeal to this court from such ruling. This brings us to a consideration of that section of the code before we can look into the evidence; it reads as follows: ‘On the trial of an indictment or information, exceptions may be taken by the defendant to a decision of the court—1. In disallowing a challenge to the panel of the jury, or to an individual juror, for implied bias; 2. In admitting or rejecting testimony on the trial of a challenge to a juror for actual bias; 3. In admitting or rejecting testimony, or in deciding any question of law not a matter of discretion, or in charging or instructing the jury upon the

§ 257. Statutory exception where challenge for actual bias.

It is not the present purpose to discuss at large the grounds of challenge, or what does and does not disqualify persons pro-law on the trial of the issue.' When the legislature said the accused was entitled to an exception to a decision of the court in admitting or rejecting testimony on a trial of a challenge to a juror for actual bias, that enactment was of little practical benefit to a defendant charged with crime. We are acquainted with but a few cases from our reports (and there the question arose under peculiar circumstances), in which an appellant has ever secured a new trial by availing himself of the benefits of the exception therein secured, although the right of a person charged with crime to have his guilt or innocence passed upon by twelve impartial jurors has been recognized and declared sacred, not only by the common law, but by the supreme law of every state of this Union. While it is not clear that any valuable rights are given to the defendant under this provision of law, it is very apparent therefrom that the legislature intended to deprive him of the right to review the action of the lower court in denying a challenge to a juror for actual bias. That is not only apparent from the section, but this court has repeatedly held such to be its object and effect. In other words, each of twelve jurors may state upon his voir dire that he has a fixed and settled opinion of the defendant's guilt, or that he has such a bias and prejudice against the defendant that he could not act with entire impartiality in the trial of the case, and if, thereupon, the court should deny a challenge to each of the said jurors upon the ground of actual bias, and impanel them as a jury to try the case, upon a verdict of guilty by such a jury the defendant might suffer death, for the legislature has said that he should be forever barred from raising in the higher court any inquiry as to the condition of mind of the men who convicted him at the time they took their places in the jury-box. This section of the code, under the construction given it by the various decisions of this court, is unconstitutional, and no extended examination of fundamental principles is necessary in order that its unconstitutionality may be made plain. The legislature of the state has power to formulate and regulate the practice of the law and the procedure under the law, but subdivision 2 of section 1170 involves principles broader and deeper than any mere question of practice or procedure.'" An equally able opinion on the same general subject, in the absence, however, of such a statutory provision as that discussed by Justice Garoutte, was that of Chief Justice Dunbar in *State v. Murphy*, 9 Wash. 204, 208, 137 Pac. 420. After setting forth the record fully, he proceeds in part, as follows: "This is all the examination that was made of the juror. At its close the defendant's counsel urged upon the court that it was defendant's right to have a fair jury; that there were a great

posed as jurors generally. But, among other matters, an exception made by statute in California and in some other states to the disqualification arising from having formed and ex-

many jurymen in the county; that it was no trouble to get a fair jury, and that therefore there was no necessity for having this man sit on the jury with his mind entertaining in the least any impressions upon the merits of the case. But the court decided that the juror was competent and he was accepted. The record shows that defendant's peremptory challenges were all exhausted. In these days of general and rapid dissemination of news and events, where rumors of crimes are spread by means of newspapers and other agencies rapidly throughout the country, and are brought to the attention of every intelligent citizen, the rule in relation to information possessed by jurors has necessarily become somewhat changed, and the strict enforcement of a lack of knowledge on the subject to be adjudicated necessarily somewhat relaxed, and it would work a miscarriage of justice if the simple reading of newspaper reports of crimes that have been committed, or the listening to rumors concerning the commission of such crimes, should be held to exclude jurors from the trial of criminal cases; and no court in this age, we think, would go to the extent of holding a juror incompetent simply because he had read newspaper reports of the perpetration of a crime, or had heard rumors concerning its perpetration. But while regarding the changed conditions of society in this respect, and giving to them due consideration, it will not do to go to the other extreme and relax the rule to the extent of depriving a defendant of his constitutional right to be tried by an impartial jury. It must be conceded that, if a juror has an opinion as to the guilt or innocence of a defendant, and that opinion is so material and tangible and fixed as to require evidence to remove it, he does not enter the jury-box as an impartial juror; and it makes no difference whether that opinion has been obtained through the medium of newspapers which professed to recite the facts, and which recitation the juror believed, or whether it was obtained by listening to the rehearsal of the facts by some individual. The material thing to be ascertained is, whether the mind of the juror is impartial and whether he has an opinion, which must always be distinguished from a mere floating impression, as to the guilt or innocence of the defendant. How he came by that opinion is entirely immaterial. If a juror testifies that he has read a newspaper account and that, if such account be true, he believes the defendant to be either guilty or innocent, as the case may be, he manifestly would be a competent juror, for he has no fixed opinion as to whether the facts which have been related to him are true or not. Hence he approaches the examination of the case with a mind perfectly susceptible to receive the truth as it appears from the testimony presented. But where he states that he has heard

pressed an opinion should be noticed. The exception has been found necessary to be made on account of the freedom with which reports of crime and alleged criminal acts are circulated

a recital of the facts, whether by a newspaper or by an individual statement, and that he believes the facts stated, and from such statements that he is in a condition of mind that it would take evidence to remove the belief that he already entertains, then it seems equally manifest that he comes to the investigation of the case with a bias either for or against the defendant, and is therefore not, in the meaning of the law, an impartial juror. Now, it is true that the juror in this case finally said, after being questioned by the court, that he thought he could wholly lay aside the impressions he had received from reading the newspapers, and try the case wholly upon the evidence introduced; but this statement gains no strength from its having been the last statement made, for when the preceding question was put to him his answer was that he could 'if he could get stronger evidence.' Stronger evidence of what? The same evidence that would be required to convict in the mind of one juror ought to be sufficient to convict in the mind of another juror; and if the presumption is that the defendant must prove his innocence by affirmative defense, it would seem that the evidence which he offered in defense, if it was strong enough to carry conviction to the mind of a person who was absolutely without any knowledge on the subject, ought to be strong enough to carry conviction to the minds of all the jurors. While, on the other hand, if the true presumption is to prevail, viz., that he is to be held innocent until proven guilty, no less amount of proof ought to suffice to convict him in the mind of this juror than would warrant his conviction in the minds of the other jurors. In other words, there ought not to be a man on the jury who is influenced by testimony or information obtained outside of the trial of the case." In *Stephens v. People*, 38 Mich. 739, the court lays down the rule that a juror's opinion as to guilt or innocence of the accused must not be such as will prevent his giving due weight to the presumption of innocence, and that a juror who is so impressed with the guilt of the accused as to need evidence to overcome his impressions is not impartial, and the court says that it is useless under such circumstances to ask him whether he can return a just and impartial verdict. Notwithstanding a statute of that state giving large discretionary powers to trial courts herein, the supreme court held that it was error to refuse to allow a challenge of a juror who had formed an opinion upon rumor which it would require evidence to remove. The court reasoned thus: "The question on this record is, whether that jury can be an impartial one whose members are already so impressed with the guilt of the accused that evidence would be required to overcome such impressions. It seems to us that this question needs only to be stated; it calls for no discussion. This woman,

in recent times through the press and otherwise. The provision, constituting the exception as found in the Penal Code of California¹¹ is that "no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety; provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him." In order to establish the exception, where it is shown that a juror has formed an opinion, the fact that it was formed in one of the ways mentioned in the above-quoted part of the statute, must be clearly shown. In *People v. Wells*,¹² the court, after setting forth from the record the examination of the juror which was had, said: "At common law, a juror who entered the box with an opinion as to the guilt or innocence of the accused was ipso facto disqualified to pass upon the question as to the guilt or innocence of

instead of entering upon her trial supported by a presumption of innocence, was, in the minds of the jury when they were impaneled, condemned already; and by their own statements under oath it is manifest that this condemnation would stand against her until removed by evidence. Under such circumstances it is idle to inquire of jurors whether or not they can return just and impartial verdicts; the more clear and positive were their previous impressions of guilt, the more certain may they be that they can act impartially in condemning the guilty party. They go into the jury-box in a state of mind that is well calculated to give a color of guilt to all the evidence; and if the accused escapes conviction, it will not be because the evidence has (not) established guilt beyond a reasonable doubt, but because an accused party, condemned in advance, and called upon to exculpate himself before a prejudiced tribunal, has succeeded in doing so." And in passing upon the degree of credit that should be given to the statement of a juror that he could impartially try a case, the court in *State v. Miller*, 29 Kan. 43, says: "Men are seldom conscious of being biased or prejudiced, or of being in such a condition that they could not try any case impartially, and be governed entirely by the evidence introduced on the trial of the case."

¹¹ § 1076.

¹² 100 Cal. 227, 34 Pac. 718. See, also, *State v. Murphy*, 9 Wash. 204, 37 Pac. 420; *State v. Wilcox*, 11 Wash. 215, 39 Pac. 368; *People v. Larabia*, 140 N. Y. 87, 35 N. E. 412; *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156; *People v. Holt*, 13 Mich. 228; *Stephens v. People*, 38 Mich. 739; *State v. Miller*, 29 Kan. 43.

the accused, but section 1076 of the Penal Code of this state, already quoted, creates an innovation upon this principle, and declares an exception to the common-law rule. But in order that a juror disqualified at common law, by reason of having previously formed an opinion as to the guilt or innocence of the accused, may come within this provision of the statute, it must appear affirmatively to the court from the evidence before it that such opinion is formed from public rumors, or statements of public journals, or common notoriety; and it must further appear to the court by the juror's declaration under oath that, notwithstanding such opinion, he can and will act fairly and impartially upon the matters to be submitted to him." And in the same case the court declared, in substance, that where it is shown that a juror entered the jury-box with an opinion as to the guilt or innocence of the accused, that fact was itself a disqualification under the law, and the disqualification continued unless clearly brought within the exception as to the manner in which it was formed, and that it made no difference that the juror declared to the court under oath that, notwithstanding such opinion, he would and could act fairly and impartially upon the matters to be submitted to him. And in *People v. Miller*¹³ the same view was expressed as follows: "Upon the foregoing state of facts the challenge to the juror upon the ground of actual bias should have been allowed. The juror went into the box with an opinion that the defendant was guilty. Such condition of the juror's mind was an absolute disqualification at common law. Under the Penal Code of this state, a single exception is found to the common-law rule, and that exception is declared in section 1076. This juror was clearly disqualified unless he came within the provisions of the aforesaid section. The exception found in the law covers the single case where the opinion of the juror is 'founded upon public rumor, statements in public journals, or common notoriety,' and it further appears to the court from the declarations of the party under oath, that he can and will, notwithstanding his opinion, act impartially and fairly upon the matters submitted to him. The court is not allowed to hold that a juror is qualified when he is impressed with an opinion as to the guilt or innocence of a defendant, unless that opinion

¹³ 125 Cal. 44, 46, 57 Pac. 770.

is based alone upon one or more of the cases enumerated in the aforesaid section of the code. When the opinion is based upon one or more of these causes, then the court has a wide margin allowed it in weighing, measuring, and testing the juror's declarations for the purpose of ascertaining his fairness and impartiality in passing upon the defendant's guilt or innocence. And here, if it appeared from the evidence that the opinion of the juror had been formed from public rumors, newspaper articles, or common notoriety, the finding of the court as to his competency probably would not be disturbed; but we have no such showing." Nor, on the other hand, is a person qualified by reason of such a statutory exception, who in fact, has a fixed opinion on the subject of the defendant's guilt, which it requires evidence to remove, though such opinion be based merely upon newspaper reports. This was decided and the decision very ably supported in the opinions by Dunbar, C. J., in two Washington cases,¹⁴ in the course of the latter of which he said: "Reading reports of the commission of crime in newspapers cannot, of course, in this day of almost universal reading, be regarded as a ground of challenge to a juror; or even casual talk that one may hear on the street or elsewhere concerning the commission of a crime; for people who read or mingle with their fellow-men during the excitement that pervades a community when a crime has been committed, are almost sure to read newspaper accounts of the commission of the crime and to hear people talking of the circumstances of its commission. If any juror should swear that, if the reports came from newspapers or from individuals, he believed the defendant guilty or innocent, or that he had made up his mind as to his guilt or innocence, that would be one proposition; but where he answered, in substance, that he has heard this talk and that he does believe them to be true or untrue as the case may be, that is altogether another proposition; and that is what this juror substantially testifies to, either that he believed them to be true or untrue. If, as he said, he had talked with a friend of his who had been subpoenaed as a witness in the preliminary examination, and that friend related to him the facts concerning the crime, and from such relation he formed an opinion as

¹⁴ State v. Murphy, 9 Wash. 204, 37 Pac. 420; State v. Wilcox, 11 Wash. 215, 220, 39 Pac. 368.

to the guilt or innocence of the defendant; and if it is true, as he said, that if he went into the trial of this case unless there were evidence to remove that opinion he would have to act upon the opinion which he already entertained, then certainly he was not an impartial juror; and if the opinion was that the defendant was guilty, and the testimony of the state and the defense balanced, his verdict, according to his statement, would have to be that of guilty. In other words, the defendant would be deprived of the right which he has to be proven guilty beyond a reasonable doubt. He would not even have the benefit of the rule in a civil action of a preponderance of the testimony; but he would have the burden thrust upon him of proving himself innocent. And that is the logical result of that condition of mind in a juror which is exhibited by the expression that it would take evidence to remove the opinion which he already entertains."

The mere opinion of a proposed juror in any case that he can fairly and impartially sit in the case and determine the issue, notwithstanding a fixed opinion is of but little value. Men are seldom conscious of being biased or prejudiced, or of being in such a condition of mind that they could not try any case impartially, and be governed entirely by the evidence introduced on the trial of the case.

§ 258. Grounds of objection to juror must be specifically stated.

To make such objection available, a case for the ruling of the court must be as clearly and fully presented as if a ruling were sought upon an offer of evidence. The benefit of an exception to the ruling on a challenge is often lost for want of an objection sufficiently specific. No particular form is prescribed by law, but the specific objection must be stated in some form. The Penal Code of California,¹⁵ now enumerates eight kinds of implied bias. In *People v. McGungill*¹⁶ it appeared that de-

¹⁵ § 1074.

¹⁶ 41 Cal. 430. To same effect, *State v. Raymond*, 11 Nev. 107, 108; *People v. Hopt*, 3 Utah, 396, 4 Pac. 250; S. C., 4 Utah, 247, 9 Pac. 407; *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. Rep. 614; *Southern Pac. Co. v. Rauh*, 49 Fed. 701; *People v. Hardin*, 37 Cal. 258; *People v. Dick*, 37 Cal. 277. If for bias, challenge must specify the particular

fendants challenged "for implied bias" generally, without pointing out either subdivision (the Criminal Practice Act, section 347, then containing nine divisions). The court held that to simply state that "the juror is challenged for implied bias" was no challenge, and that the challenge must state some of the nine causes enumerated in section 347 of the Criminal Practice Act.¹⁷ And it may be safely stated that it presents no basis for error to say to the court. "We now ask the court to permit us to exercise our right of peremptory challenge, without offering to challenge any particular juror." There is a strong intimation to such effect in one case, although the court did not see fit to pass directly upon the point.¹⁸ A very clear statement of the principle which should govern, having reference to the degree of specification required herein, is to be found in *Mason v. Glover*,¹⁹ as follows: "A party cannot make a principal challenge, or a challenge to the favor, by giving it a name. A challenge, whether in writing or by parol, must be in such terms that the court can see, in the first place, whether it is for principal cause or to the favor, and so determine by what form it is to be tried; and, secondly, whether the facts, if true, are sufficient to support such challenge. Again, the challenge must state why the juror does not stand indifferent; it must state some facts or circumstances which, if true, will show either that the juror is positively and legally disqualified, or create a probability or suspicion that he is not or may not be impartial. In the former case, the challenge would be a prin-

kind of bias, whether actual or implied: *People v. Renfro*, 41 Cal. 37. It is not sufficient to say "I challenge the juror for cause," and then stop: *Paige v. O'Neal*, 12 Cal. 483. To same effect, *State v. Squaires*, 2 Nev. 231; *Estes v. Richardson*, 6 Nev. 128; *Mason v. Glover*, 2 Greene, 195.

17 The fact should not be overlooked that the formation or expression of an opinion on the question of defendant's guilt has been taken out of the conditions and relations constituting implied bias and must be now treated as actual bias.

18 *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909. In this case, the panel being full, the defendant's attorney, whose turn it then was to challenge, said, "I will pass our peremptory for the present." The plaintiff's counsel accepted the jury. Defendant's attorney then used the words quoted above. It was held that there was no error, even if the question were not "a mere abstraction."

19 2 Greene, 195.

cial one, triable by the court; in the latter it would be to the favor, and submitted to the triers." This was said as to challenges for bias; but it is applicable to all challenges for all causes.

The grounds upon which a challenge to the panel may be based differ from those upon which an individual juror may be challenged. It is not proper to challenge the panel for bias. This is well expressed in a Nevada case,²⁰ where it was said: "After examining the jurors McClintock, Peers, Fredericks, Francisco, and Wilson, as to their actual state of feeling toward the defendant, and as to all matters from which a bias against the defendant might be inferred, the defendant, by his counsel, interposed 'a challenge to the panel herein upon the grounds that the juror McClintock expressed actual bias against the prisoner, and also the jurors Peers, Fredericks, Francisco, and Wilson, expressed themselves in such a manner toward the prisoner as to imply bias upon their part, and that the law permitting said jurors to be of the panel is unconstitutional.' It is evident that this cannot be considered as an objection to the panel of jurors. The statute provides, that 'a challenge to the panel can only be founded on a material departure from the forms prescribed by statute in respect to the drawing and return of the jury, or on the intentional omission of the sheriff to summon one or more of the jurors drawn.' There is no pretense that the objection to the panel is made upon either of the grounds specified in the statute, nor does it appear that the challenge was in the writing specifying plainly and distinctly the facts constituting the grounds of challenge, as required by section 324 of the Criminal Practice Act. A challenge to the panel is not allowed for any of the grounds set forth by counsel, and hence as a challenge to the panel it was properly overruled. A strict construction of the language used would result in the conclusion that the only challenge interposed by counsel was a challenge to the panel. But if it was also intended as a challenge to the individual jurors therein named, then the challenge for implied bias is subject to the further objection made by the attorney general, that it does not specify any ground of challenge for implied bias as provided by section 340 of the Criminal Practice Act."

²⁰ State v. Raymond, 11 Nev. 105, 106.

§ 259. Error in ruling upon evidence upon voir dire examination.

Concealment upon voir dire examination of facts by a juror may sometimes entitle a party in ignorance of them to a new trial, in some of the states,²¹ whether or not they would, if disclosed warrant a challenge for cause. The examination of a juror on his voir dire has a twofold purpose, namely, (1) to ascertain whether a legal cause for challenge exists, and (2) to ascertain whether it is wise and expedient to exercise the right of peremptory challenge given to parties by the law. It is often important that a party should know the relation sustained by a person called as a juror to his adversary, in order that he may intelligently exercise his right to peremptory challenge. It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact nor concealing any material matter, since full knowledge of all material and relevant matters is essential to a fair and just exercise of the right to challenge either peremptorily or for cause. A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge. But without a full examination with reference thereto, any objection on account of it is waived. Thus where a juror was asked whether "he or any member of his family held any life insurance policy issued by the defendant," and answered in the negative, and the fact was that a life policy had been issued by the defendant to him for the benefit of his wife, the court held that this was such a concealment that, although not constituting a cause for challenge under the statute, yet since the plaintiff had the right to a full and truthful answer, and it was the duty of the juror to make that answer without equivocation or evasion, the answer being well calculated to prejudice the party with respect to his right of peremptory challenge, the order denying a new trial on that ground was reversed.²² In this case the court said: "But we need not and do not decide whether the interest of Bowman was such as would have war-

²¹ See chapter 5.

²² *Pearcy v. Michigan Mut. Fire Ins. Co.*, 111 Ind. 59, 60 Am. Rep. 673, 12 N. E. 98

ranted a challenge for cause, for it is enough for the present to decide that the information sought by the question was relevant and material for the purpose of enabling the appellant to intelligently exercise her right to interpose a peremptory challenge." Therefore, it follows that error may be committed in passing upon the admissibility of evidence to prove conditions and relations which fall short of statutory disqualification. It would be extremely difficult, if not impossible, to fix the bounds of permissible examination with a view to peremptory challenge after failure to establish a principal or legal cause for challenge, but a certain latitude for such examination is recognized by the courts. At any rate it is well settled that a reversal or new trial may sometimes be had for error in rulings on the admissibility of evidence directed to the ground for challenge as well as upon the challenge itself.²³

§ 260. Proper practice in civil cases under the code.

In *Lombardi v. California Street Ry. Co.*,²⁴ counsel for appellant appear to have been in some doubt as to the proper procedure to obtain a review of the ruling of the court upon their challenge of a juror for actual bias, and in addition to saving an exception and assigning it for error in law, also presented the matter on affidavits as for irregularity. The supreme court in passing upon the appeal from an order denying a new trial, reversing the same, took occasion to say incidentally: "As to the question of practice it need only be said that the mode of presenting the question must depend upon circumstances. If the facts appear without contradiction, or in such form that but one conclusion can legally be drawn, it involves purely a question of law; otherwise, whether the juror is or is not qualified is a question of fact. Hence, the circumstances of each case must determine the manner in which the question should be presented upon appeal." Upon such a question as was presented on that appeal, or on any appeal, involving the qualifications of a person who has served on a jury, who has been fully examined on voir dire, as was the juror in that instance, and has concealed nothing, there are no circumstances which "determine

²³ *People v. Reyes*, 5 Cal. 347; *Pearcy v. Michigan Mut. Fire Ins. Co.*, 111 Ind. 59, 60 Am. Rep. 673, 12 N. E. 98.

²⁴ 124 Cal. 311, 57 Pac. 66.

the manner in which the question should be presented on appeal," or on motion for new trial, which is governed in the same way. Nor does it make any difference in this respect whether the evidence upon which the ruling is based is all one way and consistent, making purely a question of law, or is conflicting, or open to more than one construction. In the former event there is nothing to review; in the latter event there is a ruling upon a pure question of law, and the only way to reach it is to specify it as an error in law. In *Silcox v. Lang*,²⁵ where the appellant had sought to present the question arising upon a challenge as an irregularity, upon affidavits, the court said: "The term 'irregularity,' as here used, is of very uncertain import. We do not wish to be understood as attempting to determine, in this case, what should be considered as within the term used. It is enough, for the purposes of this case, to say that the ruling here complained of was not an irregularity within the meaning of the statute, and could not be properly presented by affidavit. Therefore, although the ruling was erroneous, the cause could not be reversed on that ground."

§ 261. Error in rulings on objections to panel.

It is a rule without exception, in both civil and criminal cases, that objections to the panel must be taken before the jury is sworn, else they are waived.²⁶

As to what form and degree of definiteness should be required in questions propounded to jurors, in order to rebut the presumption of waiver, the authorities point to the conclusion that if the questions be calculated to arouse the jurors' attention and direct it to the information desired, it is sufficient. In *Pearey v. Michigan Mut. Life Ins. Co.*,²⁷ the court said: "We think that the question asked the juror required him to answer as to the policy taken out on his life for the benefit of his wife. This is our conclusion upon the assumption that the question was that which the appellee maintains it was. It was not incum-

²⁵ 78 Cal. 118, 124, 20 Pac. 297.

²⁶ *People v. Johnson*, 104 Cal. 418, 38 Pac. 91, holding any irregularity in impaneling jury is waived by failing to object, as where, upon case being called, bailiff summoned twelve men from bystanders, and they were sworn without objection.

²⁷ 111 Ind. 59, 60 Am. Rep. 673, 12 N. E. 98.

bent upon the appellee to minutely cover by a long series of specific questions all phrases of the subject, but it was enough to ask such a question as would indicate to the mind of a fair and reasonable man what information the examining counsel sought to elicit. It seems clear that such a question as that asked Bowman ought to have drawn from him the fact that he had taken out a policy on his own life for the benefit of his wife, for the question certainly indicated that information as to his interest in the company, as well as his connection with it, was sought by the counsel conducting the examination." The decisions in the same state furnish other valuable illustrations of the character of examination which will satisfy the requirements as to diligence to overcome the imputed waiver. When the juror was asked as to whether he had formed an opinion, and answered that he had not, but no inquiry was made as to whether he had served on the grand jury which found the indictment, yet it was held, on proof that he had been a member of the grand jury, that the accused was entitled to a new trial.²⁸ It is doubtful if that would be accepted as a sufficient showing of diligence in California, Oregon and Nevada, in the view of decisions already mentioned, in view of the common and public opportunity to acquire information as to who constitute the grand jury preferring the indictment.

It is considered unimportant whether the concealment be willful or unintentional where there is a proper showing of diligence and ignorance of the facts. Thus where a juror was asked, generally, whether he was a freeholder or householder, and by reason of his erroneous opinion gave an incorrect answer, it was held that the party was entitled to a new trial.²⁹

If an objection be properly raised, calling for the introduction of evidence and for a ruling, either upon admissibility of evidence, or upon the challenge, any error therein duly excepted to, may be assigned as error in law occurring during the trial upon motion for new trial. Almost every phase of the practice herein seems to have appeared in *People v. Fellows*,³⁰

²⁸ *Rice v. State*, 16 Ind. 298. See, also, *Block v. State*, 100 Ind. 357.

²⁹ *Lanphier v. State*, 70 Ind. 317.

³⁰ 122 Cal. 233, 236, 54 Pac. 830. See, also, *People v. Welch*, 49 Cal. 174; *People v. Coyodo*, 40 Cal. 586; *People v. Goldenson*, 76 Cal.

and in one paragraph of the opinion, reading as follows: "The regular panel was exhausted in securing the jury, and a special venire was issued, directed to the sheriff. Upon its return defendant interposed a challenge to the panel upon the ground of the bias and prejudice of the sheriff who had summoned the members of it. The challenge was sustained, and a new venire ordered to issue, directed to and placed in the hands of an elisor named in the order. No showing was made that the coroner was likewise disqualified. To this order defendant reserved an exception. He also interposed a challenge to the panel thus formed. As it did not appear that the elisor was biased or prejudiced, and as that is the only ground of challenge contemplated by section 1064, defendant's objection to the panel may not be considered. But defendant reserved his exceptions to the order appointing an elisor. His point is, that the order was error in the absence of a satisfactory showing that the coroner also was disqualified, or, in other words, that the special venire under the circumstances shown should have been directed to and returned by that officer. Therefore, defendant is entitled to a consideration of the question as an alleged error at law occurring during the course of the trial." And the case was reversed because the court appointed an elisor to summons jurors to complete the panel, it not being shown that the coroner was also biased, or otherwise disqualified. Within the meaning of the term "panel" is included a special venire summoned after the regular panel is exhausted, to fill out the deficiency.³¹ The objection, where the sheriff, or other officer is biased, is to the jurors summoned by him on account of his bias, and not to the supposed irregularity. In *People v. Coyodo*,³² the defendant had been convicted of the crime of murder in the first degree. At the trial, from the regular panel, ten jurors were selected and sworn, the regular panel being then exhausted. By this time the defendant had exhausted all his peremptory challenges. A special venire for six

328, 19 Pac. 161; *People v. Wallace*, 101 Cal. 281, 35 Pac. 862; *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341; *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049.

³¹ *People v. Coyodo*, 40 Cal. 586. To same effect *People v. Welch*, 49 Cal. 174, 177.

³² 40 Cal. 586.

additional jurors having been issued, was served by the sheriff, and the jurors summoned appeared in court. The defendant then interposed a challenge to the panel returned on the special venire, on the ground that the sheriff had formed and expressed an unqualified opinion that the defendant was guilty. The challenge was denied, and on the trial of it the sheriff was sworn, and from his evidence it appeared plainly that he had formed and expressed such an opinion as would have disqualified him from serving as a juror in the case. The court in reversing the case and ordering a new trial, held that the defendant had pursued the proper practice under section 337 of the Criminal Practice Act.³³ If a special venire be summoned by order of court, and the defendant has reason to believe that the officer to whom the order is given or directed, is biased, his proper course is to challenge the panel on account of the bias of the officer, and to examine the officer under oath, touching his bias. If the court rule erroneously on the showing of bias on the part of the officer, or other person to whom the venire is given or directed, an exception thereto is available. A challenge to the panel in such case, on account of a disqualification of all the members, or of any member thereof, is of no avail. The only ground for challenge to the panel is "bias of the officer who summoned them."³⁴

³³ Corresponding with section 1064 of the Penal Code.

³⁴ Pen. Code, § 1064; *People v. Wallace*, 101 Cal. 281, 283, 33 Pac. 862. In this case Commissioner Van Clief after explaining the facts in the opinion adopted by the court said: "The jury was not drawn but was summoned by the sheriff by authority of a special venire facias regularly issued by order of the court. Before any juror was sworn the defendant challenged the panel 'on the ground that the panel of the jurors served and returned are nonresidents of the county of San Bernardino.' The district attorney said: 'Prosecution denies the challenge.' Thereupon the court overruled the challenge for the reason that the only ground of challenge to the panel of a jury summoned by a special venire is, 'bias of the officer who summoned them,' as provided in section 1064 of the Penal Code. This ruling seems to be warranted by the case of *People v. Welch*, 49 Cal. 177; but counsel for appellant contends that inasmuch as the district attorney denied the challenge, the court was bound to try the issue of fact—that is to say, the court was bound to try an immaterial issue, a decision of which would have been of no consequence on the challenge of the panel, on the sole ground that the jury sum-

§ 262. Duty to exhaust peremptory challenges.

A party who has had a remedy for error in his own hands, but has neglected to apply it, will not be heard to complain. And it is well settled upon authority that although a party has unsuccessfully challenged a juror for cause on account of disqualification, and then proceeded to trial without interposing a peremptory challenge, having one or more left, he thereby waives the objection, so that, although the court may have erred in overruling his challenge, he is not entitled to a new trial or reversal on account of such error. In *People v. Durrant*,³⁵ the rule and its reasons are thus stated: "The defendant may not have reviewed an error which he has invited or has failed to avoid by the legal means at his command. If the defendant feared to put himself upon trial before the jurors whom he had challenged, it was his duty to have availed himself of the liberal aid which the law affords and to have excused them from the box. If, in so doing, he lessened the number of his peremptory challenges to such an extent that it appears they were exhausted before the completion of the jury, he may well be heard to urge in argument that by reason of the erroneous ruling, the number of his peremptory challenges was improperly curtailed, and he was deprived of a legal right; but, if it is shown, as here, that the two jurors in question were accepted and allowed to remain, when the defense could have exercised peremptory challenges upon them, and, further that at the time when the jury was completed there was still held in reserve by the defense nearly half of its peremptory challenges—if, under these circumstances, error was committed by the trial court, it was either permitted by the defense, or acquiesced in by its failure to exercise its legal right, and the ruling will not be reviewed."

moned were nonresidents of the county. I think the mere statement of this proposition is a sufficient refutation of it."

³⁵ 116 Cal. 179, 196, 48 Pac. 75. To same effect, *Prewitt v. Lambert*, 19 Colo. 7, 34 Pac. 864; *Territory v. Hart*, 7 Mont. 42, 58, 17 Pac. 768; *Territory v. Harding*, 6 Mont. 326, 12 Pac. 750; *Lum v. State*, 11 Tex. App. 483; *Presbury v. Commonwealth*, 9 Dana, 203; *State v. Elliott* 45 Iowa, 487; *Benton v. State*, 30 Ark. 340-344; *Erwin v. State* 29 Ohio St. 190 23 Am. Rep. 733; *People v. McGungill*, 41 Cal. 429, 430; *State v. Hartley*, 22 Nev. 342, 357, 40 Pac. 372; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898.

§ 263. Right of party to full panel before exercising right of challenge.

The proper practice upon the proceeding to obtain a jury is well settled upon authority. When one or more of a full panel of twelve has been excused or challenged off for cause, the parties are entitled to a full panel of twelve men majores exceptionis before being required to exercise the right of peremptory challenge. The proper practice in the selection of a jury is to fill the panel, and upon one of the jurors being challenged for any cause, or "without cause," to immediately call another to take his place, so that a party, in determining whether to challenge or not may do so with a full panel before him.³⁶ Nor is the fact that a party has once passed the jury as satisfactory, a waiver of his right to challenge a juror once accepted, upon the addition of another, or others to the panel. In *Silcox v. Lang*,³⁷ the trial was by a jury of eight (by agreement probably, though the report of the case does not explain). In impaneling the jury, each of the parties challenged a juror peremptorily; the plaintiffs then announced that they were satisfied with the jury; the defendants challenged a second juror, and announced that they were also satisfied, whereupon the plaintiffs offered to challenge another juror, to which the defendants objected, on the ground that it was contrary to section 601 of the Code of Civil Procedure, and that plaintiffs had waived the right to challenge such juror, and could not do so without good cause. The objection was sustained, and the right to challenge denied. Other jurors were called to supply the place of those who had been challenged, whereupon the plaintiffs renewed their challenge to the same juror, and the right to such challenge was again denied. Under these circumstances the judgment and order denying a new trial were reversed, for the error of the court in denying plaintiffs' challenge, holding that the fact that the plaintiffs had once passed the jury, including the juror afterward sought to be challenged, did not cut off his right. In

³⁶ *Silcox v. Lang*, 78 Cal. 118, 123, 20 Pac. 297; *People v. Scoggins*, 37 Cal. 676; *Taylor v. Western Pac. R. R. Co.*, 45 Cal. 323, 330.

³⁷ 78 Cal. 118, 20 Pac. 297. See, also, *Knollin (A. J.) Co. v. Jones (Idaho)*, 63 Pac. 638; *Sterling Bridge Co v. Pearl*, 80 Ill. 251; *Hunter v. Parsons*, 22 Mich. 96; *Hartzell v. Commonwealth*, 40 Pa. St. 462, 466; *Spencer v. De France*, 3 G. Greene, 216.

delivering the opinion, the court said, on this point: "The fact that a party may pass the panel as satisfactory to him, at a certain stage of the examination cannot be held to cut off his right to challenge one of the jurors so passed, at a later stage. Such changes may have been made by subsequent challenges as to render it desirable to him that the particular juror should not sit, and of this the party must be the sole judge. The right of challenge may be exercised at any time before the juror is sworn."

CHAPTER 15.

ERRORS IN RULING UPON EVIDENCE.

- § 264. Distinction between erroneous admission and insufficiency of evidence.
- § 265. Order of introduction—Seldom subject of error.
- § 266. Same—Statutory provisions.
- § 267. Discretionary power extends to setting aside submission of motion for nonsuit to receive evidence.
- § 268. Whether court has power to set aside decision.
- § 269. Discretion may be abused.
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- § 271. Offer of evidence—When should and when should not be specifically directed—Explaining and limiting purpose.
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- § 279. Same subject—Illustration of rule that party must "place his finger on the precise point of objection."
- § 280. Same subject—Slight variance from allegation must be pointed out.
- § 281. Same subject—With reference to time to which offered evidence relates.
- § 282. Same subject—Application of rule to expert testimony.
- § 283. Same subject—Application of rule to opinion as to market value.

- § 284. Same subject—With reference to change of condition by lapse of time.
- § 285. Same subject—With reference to questions impeaching party's own witness.
- § 286. Same subject—Phraseology of objection.
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- § 290. Error in ruling on offer to make proof—Evidence not actually offered.
- § 291. Offer of evidence en masse proper practice.
- § 292. Deposition not to be segregated and read in parts.
- § 293. Error cannot be predicated on form of questions.
- § 294. Error resulting from production and nonproduction of documentary evidence.
- § 295. Error in case of joint parties in admission or rejection of evidence, admissible as to one party, but inadmissible as to another.
- § 296. Repeating objection—When not necessary.
- § 297. Error in striking out and refusing to strike out evidence.
- § 298. Same subject—Rules and illustrations.
- § 299. Motion must be specific.
- § 300. Exceptions—Form of and when to be taken.
- § 301. Waiver and cure of error herein.

§ 264. Distinction between erroneous admission and insufficiency of evidence.

A failure to note the distinction between insufficiency of evidence and error in law in rulings upon the admission of evidence has led to some confusion in practice. In determining on motion for new trial as to the sufficiency of the evidence to support the verdict or decision, all the evidence actually admitted is entitled to consideration without regard to whether or it was properly or improperly admitted, the effect of evidence being the principal matter to be considered. Where, however, the ground relied on for a new trial consists in an alleged error of the court in ruling upon the admissibility of evidence, the possible effect of the evidence is considered only in connection with, and as an incident to the error, with a view to determining whether the error was prejudicial or harmless.

The distinction is clearly pointed out in *McCloud v. O'Neall*,¹ where the appellant urged that an error of the court in a ruling upon the admission of certain evidence should be considered in passing upon the sufficiency of the evidence to support the verdict. Cope, J., delivering the opinion, said: "This is an appeal from an order granting a new trial; and it is admitted that if all the evidence in the case was properly before the jury, this order cannot be disturbed. We think that no question can be raised upon this subject; and that the court, in passing upon the motion for a new trial, could not properly have disregarded any portion of the evidence upon which the jury acted, in making up their verdict. The jury were bound to consider all the evidence before them; and the question for the court was, whether, upon this evidence they had arrived at a correct conclusion. In other words, the court was called upon to determine whether the jury had properly discharged their duty, and it is obvious that for the purpose of determining this question, it was necessary that full effect should be given to the evidence. When the competency of the evidence has been declared by the court, the jury are compelled to receive it, and make it the basis of their verdict, and we are unable to see upon what principle any part of it can be disregarded upon a subsequent inquiry as to the correctness of the verdict. As a matter of course, a verdict obtained upon incompetent evidence may be set aside; but this cannot be done where the evidence was admitted without objection; nor can it be done even where the evidence was objected to, upon the ground that effect was given to it by the jury. That which vitiates the verdict, in such a case, is the error of the court admitting the evidence; and if the party, seeking to set aside the verdict, is not in a position to take advantage of this error, he cannot be heard to object that the evidence was improperly admitted. Where the only objection is that the verdict was not authorized by the evidence, the question of competency is not a matter for the

¹ 16 Cal. 393, 397. See *Golden Gate M. & M. Co. v. Hendy (Joshua) M. Wks.*, 82 Cal. 184, 23 Pac. 45, holding that evidence which is stricken out cannot be considered upon a question whether there is evidence sufficient to justify the verdict. An agreement as to what shall constitute proof takes it out of the rules governing the admissibility of evidence: *Tolman (John A.) Co. v. Bowerman*, 5 S. Dak. 197, 58 N. W. 568.

consideration of the court; and whatever was before the jury must be regarded as proper and legitimate evidence.” And where evidence is offered and properly admitted in the absence of tenable objection, or of any objection, the ruling of the court admitting it cannot be rendered erroneous by the effect of evidence subsequently introduced. Upon the same principle, a ruling properly excluding evidence as offered, or in view of the objections to it, is not affected by subsequent evidence admitted. Thus in *Depuy v. Williams*,² the court excluded certain evidence which was immaterial without other proof. Subsequently such other proof was made, but the excluded proof appears not to have been reoffered. In delivering the opinion, Rhodes, J., said: “At the time plaintiffs offered to prove that Milton colluded with the defendants, that they might get possession of the claim, no evidence had been offered tending to prove that any arrangement or agreement had been made between Milton and the other plaintiffs, by which he was to hold the claim, or do any act for them or on their account, nor did they see proper to prove in connection with the testimony then offered, that any such arrangement or agreement had been made, or was proposed to be made. The fact of the collusion of Milton with the defendants was immaterial, and the ruling of the court being correct at the time it was made, proof subsequently made, completely establishing an agreement, by which Milton was to hold the possession of the claim for the plaintiff, and perform the necessary amount of work, and do all the acts that were requisite under the mining laws, to enable them to continue to hold and own the claims, would not have the effect of rendering the decision erroneous.”

§ 265. Order of introduction—Seldom subject of error.

The law favors the greatest liberality in the admission of evidence, and leaves the order of its introduction almost entirely within the discretion of the trial court.³ An excellent illus-

² 26 Cal. 309, 315.

³ *Gordon v. Searing*, 8 Cal. 49; *People v. Shainwald*, 51 Cal. 468; *Crossett v. Whelan*, 44 Cal. 200; *Bates v. Tower*, 103 Cal. 404, 37 Pac. 385; *Cousins v. Partridge*, 79 Cal. 224, 21 Pac. 745; *First Nat. Bank v. Wolf*, 79 Cal. 70, 21 Pac. 551, 748; *Lick v. Diaz*, 37 Cal. 437; *Lisman v. Early*, 15 Cal. 199; *Barkly v. Copeland*, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307; *Bowman v. Eppinger*, 1 N. Dak. 21, 44

tration of the policy of appellate courts herein is seen in the opinion by Justice Moore, in *Barrett v. Schleich*⁴ as follows: "The parol agreement to convey real property is the foundation, and the part performance thereof by the purchaser is the superstructure, which, considered as a unit, authorizes a court of equity specifically to enforce the contract; and it seems to us that, under our statute respecting the order of proof, it is discretionary with the court as to which of the two important facts shall be first proven. It is argued by defendant's counsel that the right of the court to regulate the order of proof relates to the reception of competent evidence only, and not to a right to admit incompetent testimony. If it be conceded that the point insisted upon be true, the legal principle thus involved can have no application to the case at bar; for it is admitted that evidence of the oral agreement would be admissible after proof of the acts of part performance had been made." And though anticipatory of a subject elsewhere fully considered, it may be well to state here that no ruling of the court as to the mere order of proof will be held an abuse of discretion unless some probable, or at least possible injury may have resulted. Thus in *Bates v. Tower*⁵ the court said: "The general rule is that the mere order in which evidence may be introduced is very much in the discretion of the court, and will not be interfered with by the appellate court, except in cases

N. W. 1000; *Barrett v. Schleich*, 37 Or. 613, 62 Pac. 792; *Baird v. Gleckler*, 7 S. Dak. 284, 64 N. W. 118; *Ashton v. Ashton*, 11 S. Dak. 610, 79 N. W. 1001.

Cross-examination.—Ordinarily, cross-examination should be limited to matters brought out on examination in chief: *Connor v. Carson*, 13 S. Dak. 550, 83 N. W. 588. A defendant cannot, as against proper objection, introduce his case by cross-examination of plaintiff's witnesses: *First Nat. Bank v. Smith*, 8 S. Dak. 7, 65 N. W. 437. Otherwise, where he merely seeks to disprove by the witness the case made out by the testimony of the witness in chief: *Wendt v. Railway Co.*, 4 S. Dak. 476, 57 N. W. 226. See *Novotny v. Danforth*, 9 S. Dak. 301, 68 N. W. 749; *Noyes v. Belding*, 5 S. Dak. 603, 59 N. W. 1069. Thus an attorney suing for pay for services may, on cross-examination, be asked as to his carelessness: *Cranmer v. Association*, 6 S. Dak. 341, 61 N. W. 35.

⁴ 37 Or. 613, 617, 62 Pac. 792.

⁵ 103 Cal. 404, 406, 37 Pac. 385; as to waiver and cure of error, see § 301.

of abuse of such discretion. But appellant contends that subdivision 5 of section 1870, of the Code of Civil Procedure is an exception to this general rule, and permits the acts and declarations of agents to be proved only 'after proof of agency.' Conceding this to be as contended, though I have found no case in which the code has been so construed, yet it is clear that appellant was not injured by the alleged error." This power pertains to the court, and should not be abdicated, in favor of a license to the litigants to disregard it. It is seldom, however, that error can be successfully urged upon no better ground than a disregard of the proper order of proof. And where it did not appear from the record that certain competent evidence objected to and excluded, was excluded on the ground that it was offered out of its proper order, the supreme court refused to assume that it was, and assumed that it was erroneously rejected as incompetent.⁶

§ 266. Same—Statutory provisions.

Since, however, a party may be placed at a great disadvantage by a disregard of the natural and established order for the introduction of evidence, the matter has been regulated by statute in most of the states.⁷ Such statutes, being little more than advisory, discretionary control of the matter is still, to a great extent, retained by the courts. The order established by such statutes must be observed unless a different order be per-

⁶ *Lick v. Diaz*, 37 Cal. 437, 446. A party cannot predicate error upon rejection of evidence offered to rebut evidence, which he has drawn out on cross-examination of a witness for the opposite party upon a collateral matter: *Buckley v. Silverberg*, 113 Cal. 673, 680, 45 Pac. 804. The meaning of the court here evidently is that a party cannot base rebuttal evidence upon incompetent evidence drawn out by himself from witnesses for the opposite party, though without objection.

On defense of statute of limitations.—It is often difficult to determine the proper course to be pursued by a defendant, in the matter of objecting to evidence, where he has pleaded the statute of limitations. The fact that one item, proof of which is offered, appears upon the face of the offer to be barred does not always justify an objection to it on that ground: See *Bode v. Lee*, 102 Cal. 583, 589, 36 Pac. 936.

⁷ See Cal. Code Civ. Proc., §§ 607, 2042; Hill's Ann. Laws, Or., § 830.

mitted by leave of the court. If a plaintiff, for instance, should keep back all his testimony on a material point, until he has drawn out all the testimony of the other party, and then seek to introduce it, he does so at the risk of having it excluded by the court. The rule and its reason are stated, and the discretionary power of the court recognized, in *Kohler v. Wells*⁸ in these words: "The defendants object, on the ground that this evidence should have been offered on the plaintiff's original case before he rested. The court sustained the objection and plaintiff excepted. This ruling presents the most important question in the case. It must be borne in mind that the plaintiff had offered no proof at all on this point; yet it was a point upon which was essential to his recovery. He did not now, so far as appears by the record, show to the court that he had, through any mistake in law, or from any inadvertence, omitted to introduce evidence on this point, and, upon some reasonable cause shown, appeal to the discretion of the court to open his case and permit him to supply the defect. But he simply relied upon his right to introduce the testimony by way of rebuttal. It was testimony that clearly belonged to the original case of the plaintiff, and should have been introduced before he rested; for, if it tended to prove anything material, it was that Kohler did not deposit a lead bar. A plaintiff has no right to keep back all his testimony on any material point until he draws out the testimony of the other party and then come in with his own. This would give him an undue advantage, contrary to the rules of law, and if he does so reserve his testimony, deliberately and willfully, the courts will not allow him to come in after the defendant rests and make out his case. But whether plaintiff will be permitted to reopen his proofs or not, is a question which rests very much in the discretion of the court below, upon consideration of the circumstances surrounding the particular case." A party may not offer evidence out of order, however competent, relevant and material, and have it admitted as of right without asking and obtaining leave of court to do so. In *Young v. Brady*⁹ the plaintiff, in

⁸ 26 Cal. 606, 614. See, also, *Young v. Brady*, 94 Cal. 128, 130, 29 Pac. 489; *Union Water Co. v. Crary*, 25 Cal. 506, 85 Am. Dec. 145.

⁹ 94 Cal. 128, 130, 29 Pac. 489. See, also, *Ahrens v. Adler*, 33 Cal. 608; *Consolidated Nat. Bank v. Pacific Coast S. S. Co.*, 95 Cal. 1,

rebuttal, offered evidence which should have been offered as part of his original case. The defendant objected, and the court excluded it upon the ground that the evidence was part of plaintiff's original case, which should not have been withheld for the purpose of rebutting the evidence on the part of the defendant. The supreme court, in affirming the judgment, said: "The court was not asked to permit the plaintiff to reopen his case for the purpose of introducing this testimony; therefore, the court did not err in excluding it as a part of plaintiff's original case."

The correctness of a ruling rejecting an offer of evidence out of order, after the amendment of a pleading by the opposite party, generally depends upon whether any new issues are raised, or existing issues are changed in any material respect, by the amendment.^{9a} The question, in case of the amendment of the complaint, may sometimes be tested by considering whether it necessitates an amendment of the answer, or whether an amendment of the answer would be proper.^{9b}

§ 267. Discretionary power extends to setting aside submission, motion for nonsuit, etc., to receive evidence.

The court may not only change the established order up to the close of the evidence, but may set aside the submission and allow one or both parties to introduce additional evidence. In *Clancy v. Lord*,¹⁰ which was an equity case, this was done three months after a verdict had been returned on special issues submitted to a jury, and the course pursued by the trial court was sanctioned by the supreme court, although it did not appear why the court had thus delayed action. The return of the verdict by the jury did not, however, affect the question, because the verdict was merely advisory. In the exercise of the same discretionary power, it was held that the court properly ad-

29 Am. St. Rep. 85, 30 Pac. 96; *People v. Christensen*, 85 Cal. 568, 24 Pac. 888; *McGrath v. Wallace*, 85 Cal. 622, 24 Pac. 793.

^{9a} *Ahrens v. Adler*, 33 Cal. 608.

^{9b} See *Akin v. Albany N. R. R. Co.*, 14 How. Pr. 339; *Whitcomb v. Hungerford*, 42 Barb. 185; *Dax v. Dey*, 3 Wend. 362.

¹⁰ 87 Cal. 413, 418, 25 Pac. 493. See, also, *Keys v. Warner*, 45 Cal. 60. Held proper to set aside submission, permit an amendment of the complaint, and the introduction of further evidence, to the end that the case might be disposed of on its merits: *Andrus v. Smith*, 133 Cal. 78, 65 Pac. 320.

mitted evidence after motion for nonsuit,¹¹ to permit a second offer of evidence previously ruled out, subsequent evidence showing its competency and materiality.¹² Also, where subsequently the proper foundation is laid, or the necessary authentication is procured, evidence previously rejected in their absence may be admitted.¹³ On the other hand, the court may refuse to admit evidence offered out of its proper order, and its ruling will not be disturbed unless a clear abuse of discretion be shown. Thus, it was held not error to refuse to set aside a submission to enable the plaintiff to prove the steps leading up to the introduction of a tax deed, where the defendant had at the time of the introduction of the deed notified him that such proof would be required, and there was no sufficient showing that the necessary preliminary proof was omitted through inadvertence.¹⁴ Clearly, a party has no claim upon the favorable exercise of the court's discretion to set aside a submission, reopen a case and receive further evidence, unless he can show proper diligence or excusable neglect in not previously offering it; also that it is material.¹⁵

A party who might otherwise allege an abuse of discretion in setting aside a submission upon application of the other party, may estop himself from urging the point by availing himself of the opportunity to introduce further evidence.¹⁶

§ 268. Whether court has power to set aside decision.

The power of the court to set aside its findings and receive additional evidence, in the absence of a motion for new trial, and without an entire retrial, may well be doubted. If it may do so, it is evident that a court could set aside a decision and judgment and render a new and different judgment, without

¹¹ *Abbey Homstead Assn. v. Willard*, 48 Cal. 615; *May v. Hanson*, 5 Cal. 360, 63 Am. Dec. 135.

¹² *Foote v. Richmond*, 42 Cal. 439, 442.

¹³ *Foote v. Richmond*, 42 Cal. 439, 442.

¹⁴ *Haines v. Young*, 132 Cal. 512, 64 Pac. 1079.

¹⁵ See *Consolidated Nat. Bank v. Pacific Coast S. S. Co.*, 95 Cal. 1, 16, 29 Am. St. Rep. 85, 30 Pac. 96; *Haines v. Young*, 132 Cal. 512, 64 Pac. 1079.

¹⁶ *Keys v. Warner*, 45 Cal. 60.

the pretext of admitting more evidence; in other words, sit as a court of review on its own judgments.¹⁷

§ 269. Discretion may be abused.

There is undoubtedly a limit to the discretionary power of trial courts herein. But here, as in other cases, the only limitation that the law has placed upon the exercise of discretionary judicial power is a vague one, namely, that it must not be abused. While it may be difficult to define what is meant by abuse of judicial discretion, and whatever it may imply as to the disposition and motives of the judge, it is fairly deducible from the cases that one of its essential attributes is that what is claimed to be an abuse must be shown to have effected an injustice to the complaining party. This injury was held sufficiently shown in a case where the court improperly sustained an objection to a question on cross-examination.¹⁸ In this case the court took occasion to discuss the importance of cross-examination and liberality which should be shown in permitting it, as follows: "We do not think the respondent can maintain his position. In the first place, the right of cross-examination is one of the most important privileges pertaining to a trial of an issue of fact. It exists, and ought to exist, in great latitude, for it is the only effectual shield against perjury, and the only sure means of eliciting the whole truth. We are inclined to agree with the counsel for the appellants, that courts are apt to take too narrow a view of the rights of the examiner in such cases, and to give too extended a scope to the rule that a cross-examination is to be confined to the subject matter of the evidence in chief. Undoubtedly, the cross-examination cannot go beyond that matter; but it ought to be allowed a very free range within it. In order to this, the witness may be sifted as to every fact touching the matters as to which he testifies, so that his temper, leanings, relations to the parties and the cause, his intelligence, the accuracy of his memory, his disposition to tell the truth, his means of knowl-

¹⁷ The question of the court's power over its findings after filing further discussed in chapters 1, 19.

¹⁸ *Jackson v. Feather River Water Co.*, 14 Cal. 18. On subject of discretion, see, also, *Priest v. Union Canal Co.*, 6 Cal. 170; *Miller v. Sharp*, 49 Cal. 233.

edge, his general and particular acquaintance with the subject matter, may be fully tested. Much must be left to the discretion of the counsel upon this subject." On the other hand, it was held error to permit, on cross-examination of plaintiff, proof of the execution of an agreement relied upon as a defense to a note in suit.¹⁹ In this case the court said: "The court might, in its discretion, as is often done, permit the defendant to prove by plaintiff's witness, when on the stand, the due execution of an agreement important to his defense. This course, treated as a mere matter of convenience, was not open to serious objection. To permit this agreement to be then admitted in evidence was, however, quite a different matter. It was, in effect, to inject into the case of the plaintiffs a portion of the defense, and was subversive of known and fixed rules of procedure and violative of the whole theory upon which those rules are founded. The proof of the execution of the written agreement of August 6, 1892, was not proper in cross-examination, and its admission in evidence was error." This, however, like the case just previously noticed, presents a case of error that is a violation of the established rules governing the introduction of evidence. The courts too often neglect to discriminate herein.

And injustice may as well result from a refusal to suspend the established order of proof as in too free an exercise of the power to change it. If a party should make as strong a showing in support of an application to introduce evidence out of order as would entitle him to a new trial on motion therefor for newly discovered evidence, it would amount to an abuse of discretion for the court to refuse to grant it; and a denial of the application would no doubt be held an abuse of discretion on the part of the court. And since the inadvertence has, as a rule, less serious results to the opposite party than the granting of a new trial upon newly discovered evidence, it has been held an abuse of discretion to refuse leave to supply an inadvertent

¹⁹ *Haines v. Snedigar*, 10 Cal. 18, 21, 42 Pac. 462.

As to right to have entire paper read.—If one party reads a portion of a written document in evidence in his behalf, the other party is entitled to the reading of the remaining portions thereof, before the intervention of other evidence, and a refusal to permit it is error: *Spanagel v. Dellinger*, 38 Cal. 278, 284.

omission after motion for nonsuit.²⁰ In *Barry v. Bennett*²¹ the court said that the lower court should have permitted a witness to be recalled to prove a material fact, such permission having been refused, notwithstanding that it was made to appear that knowledge that the witness would so testify had come to the knowledge of counsel after the witness was excused; but, as the judgment and order were reversed principally on other grounds, it cannot be said that it would have been reversed as for abuse of discretion therein.

§ 270. Same—Discretion somewhat narrowed in criminal cases.

Less latitude of power in suspending the regular order in favor of the prosecution in criminal cases is conceded than to either party in civil cases. Circumstances may render it very prejudicial to defendants in criminal cases to admit evidence out of order. Thus it was held to be error to permit the prosecution, where embezzlement was charged, when putting in their evidence in chief, to show that the prosecuting witness had certain money on deposit, in order to strengthen or bolster the testimony of such witness, in anticipation of the evidence for the defendant. But whether the error would warrant a new trial or reversal was not decided, as a reversal was had on the ground of the insufficiency of the evidence.²² In another case (having the same title), it was held prejudicial error in a prosecution for rape, for the district attorney to be permitted to ask the prosecutrix whether she had ever had sexual intercourse with defendant previous to the assault, it being only proper for rebuttal upon an attack being made upon her previous chastity by the defendant.²³ And in *People v. Van Ewan*,²⁴ it was held that upon the defendant's counsel having

²⁰ *Low v. Warden*, 70 Cal. 19, 11 Pac. 350.

²¹ 45 Cal. 80, 84.

²² *People v. O'Brien*, 106 Cal. 104, 39 Pac. 352. The order of proof in criminal cases is prescribed by section 1093 of the Penal Code, but by section 1094 the order is left very much within the discretion of the court, which will not be disturbed except in case of abuse: See *People v. Gordan*, 103 Cal. 568, 37 Pac. 534.

²³ *People v. O'Brien*, 130 Cal. 1, 6, 62 Pac. 297.

²⁴ 111 Cal. 44, 43 Pac. 520.

a witness for the prosecution to merely identify two items on a paper, which, however, was not introduced in evidence by him, it was error to allow the prosecution to introduce the paper on redirect examination.

§ 271. Offer of evidence—When should and when should not be specifically directed—Explaining and limiting purpose.

Where a party offers evidence competent to prove material facts in issue under the pleadings, it is error to exclude the evidence merely because the party does not then explain that he intends to follow it up with proof as to other material facts by other witnesses. And it is doubtful if the court can require a party to give such explanation, except where the offered evidence is incompetent in the absence of other or preliminary proof. In a case of this kind the court said: "It is now contended, however, by respondent that the evidence was inadmissible because the offer did not embrace every fact necessary to establish the defense. It was relevant as far as it went. The defendant may not have been able to prove all the facts by the witnesses then under examination. It may be that he intended to prove other facts by other witnesses, who did not know the fact now offered. It does not appear that he was called upon to state whether he intended to follow the testimony offered by others' testimony or not. As this essential evidence was excluded, it would have been useless to offer testimony as to the other facts necessary to sustain this defense, because, without the testimony offered and excluded, he must necessarily have failed on that defense. It does not appear that the evidence was excluded, because the defendant did not propose to prove the other facts essential to his defense. If this was the point of the objection it should have been so stated."²⁵ But if an offer of evidence does not show its admissibility on its face, it is the duty of counsel to explain the purpose for which it is offered, and its relevancy. If with or without the explanation, the relevancy of the evidence is not apparent, it is not error to sustain a general objection to it. Thus, where

²⁵ *Tyler v. Green*, 28 Cal. 407, 409, 87 Am. Dec. 130, note. See, also, *Palmer v. McCafferty*, 15 Cal. 334; *People v. Brotherton*, 47 Cal. 388; *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310.

in an action by an architect for services, a party placed a witness upon the stand to prove a copy of a lithographic sketch of a gallery, the pertinency of which was not apparent, saying: "I want to prove that Mr. Sullivan got this sketch from Mr. Havens," etc., his only explanation being that he offered this evidence for what it was worth, it was held that the trial court had properly concluded that it was worth nothing.²⁶

It is the undoubted rule that, when evidence is offered generally and admitted, it is evidence for all proper purposes, but it is also the rule that evidence may be admissible for a specific purpose, and, when so admissible, the trial judge should state the purpose for which it is to be received and considered by him, or by the jury. And particularly should he do this when his attention is directed to the matter, and he is asked to declare those purposes.²⁷ And where evidence is admissible for

²⁶ *Havens v. Donohue*, 111 Cal. 297, 301, 43 Pac. 962. See, also, *Taylor v. Kelly*, 103 Cal. 178, 37 Pac. 216, as to duty of counsel to explain offer. In the second case the court said: "It is not apparent, therefore, that the answer to the question would have been material, and in such case counsel should have stated the fact he expected to prove, and made an offer to prove it, by the witness, and thus put in the record the facts which would show whether it was material. In the absence of such statement in the record we cannot say that the facts expected to be stated in answer to the question were material, or, if material, that appellant was prejudiced by the ruling."

²⁷ *Byrne v. Byrne*, 113 Cal. 294, 297, 49 Pac. 536. In this case the court illustrates the importance of having the trial court declare the specific purpose for which evidence is received in certain cases as follows: "Thus, for example, a letter may be offered merely to prove the handwriting of a party or of a witness. To admit that letter generally, or for all proper purposes, would admit as well the contents of the letter, and, unless the court by its ruling specifically limits the purpose of the admission, objecting counsel can never know the inner workings of the mind of the court, nor be able to tell for what purpose it was considered. They would thus be deprived of the opportunity of urging upon the attention of this court a valid objection to the introduction of evidence which they had done their utmost to have cast in perfect form. Or, again, a letter might be admissible in evidence to prove the state or condition of mind of the person writing it, as frequently happens in cases of contested wills under charges of undue influence or fraud. In such an instance, the contents of the letter would be admissible as tending to show the state of mind of the writer, but it would not be ad-

some specific purpose, but not generally, the purpose should be explained; otherwise there is no error in rejecting it.²⁸

When evidence is offered which is of a general character rendering it inadmissible, but admissible for exceptionable purposes or under exceptional circumstances, such explanation must accompany the offer as will bring it within an exception. Thus in *Stevens v. San Francisco etc. Ry. Co.*,²⁹ the appellant had excepted to a refusal of the court to permit him to prove the general reputation of an employee of the defendant for sobriety among those employed in the ferry service. The court, after quoting from *Greenleaf on Evidence*, said: "There are some exceptions to the general rule enunciated by *Greenleaf*, but the offer of plaintiff failed to bring the proffered testimony within any of the exceptions. In other words, the offer was general. In his brief, counsel for appellant argues that this evidence was proper as tending to bring knowledge of the habits of the engineer home to defendant. If offered for that specific purpose, it should have been so specified, which was not done. Where evidence is admissible, not generally, but for some specific purpose, the offer should designate the purpose."

When an offer is made of evidence not apparently relevant, an offer must be made to prove all the facts, which taken in connec-

missible as establishing, or tending to establish any facts or recitals or charges which the letter might contain. Yet, if generally admitted, how could objecting counsel know but that the court considered the letter for these purposes?" Technical error in limiting evidence of what was said in a conversation was held to be without prejudice where substantially the whole conversation was subsequently admitted in evidence, and the parts excluded were not essential to a thorough understanding of what was said: *People v. Phelan*, 123 Cal. 551, 56 Pac. 424.

²⁸ *Stevens v. San Francisco etc. Ry. Co.*, 100 Cal. 554, 570, 35 Pac. 165. See, also, *Smith v. East Branch Min. Co.*, 54 Cal. 164; *Shroeder v. Schmidt*, 74 Cal. 459, 16 Pac. 243. In this case the court said that the offer was too vague. It was held that the refusal of the court to allow defendant's counsel to read certain testimony taken at the preliminary examination, for the purpose of contradicting the prosecutrix, was not shown to be error where such counsel did not point out to the court wherein it contradicted the witness: *People v. Totman*, 135 Cal. 133, 67 Pac. 51.

²⁹ 100 Cal. 554, 570, 35 Pac. 165.

tion with the facts already proven, are necessary to render the offered evidence relevant, otherwise the court is justified in sustaining an objection to the offer.³⁰

§ 272. When matter considered in evidence without formal offer.

It is not absolutely necessary for matters competent to be put in evidence to be formally offered and admitted in evidence. A party may so conduct himself with respect to a proper subject of evidence produced in court by the other party as to estop himself from afterward taking advantage of the absence of a formal offer and admission of the same. Thus where certificates of purchase of swamp land were produced and identified by the surveyor general, and who appeared as a witness and testified, and by formal order of court were left with the reporter, and the parties examined and cross-examined the surveyor general concerning the indorsements thereon, it was held that both the court and counsel understood the documents to be in evidence, and that they should be so considered.³¹ And where the

³⁰ Chamberlin v. Vance, 51 Cal. 75.

³¹ Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336. To same effect, Pearson v. Pearson, 46 Cal. 610, 628; Landers v. Bolton, 26 Cal. 393, 416. In the second case the court said: "It appears from the statement on motion for a new trial, that at the close of the testimony 'plaintiff's counsel then said that they desired that the original will should go with the papers in evidence, that the court might inspect the original manuscript, and observe the alterations and interlineations in different handwritings, to which the defendant's counsel assented, saying that they too wanted it to go into evidence.' We think this must be regarded as putting the will in evidence for every purpose for which it was legitimate testimony." In Landers v. Bolton, 26 Cal. 393, 415, the findings as well as the statement recited the contents of a deed, or something in the nature of a deed, as being in evidence. It was contended on appeal that no deed was actually placed in evidence. The court said: "The deed described in the finding corresponds exactly with the one stated in the transcript to have been offered in evidence, and it is inconceivable that the court should have made the finding unless the deed or a record copy of it was in evidence. The necessary inference from the record is, that it was in evidence in some form, and the presumptions are all in favor of the correctness of the judgment of the court below. Error must be affirmatively shown. No objection to the introduction of the evidence below having been made, probably the attention of the at-

certificate of appointment of a guardian ad litem for infant plaintiffs was handed to the clerk as an exhibit, with the declaration, "This is the paper in reference to the guardian ad litem," without further remark by either party, but it appeared that both parties understood that it was in evidence, it was held that it should be so considered.⁸² But papers on file in one proceeding cannot be considered in evidence in another, though both relate to the same subject matter, and the papers which it is claimed should be so considered are referred to and freely commented upon in argument. In *Estate of Moore*⁸³ the court said: "It is argued on behalf of the petitioner that the papers and records referred to were a part of the proceedings in the settlement of this same estate, and that for that reason it was the duty of the court to examine and consider them in determining the question whether the administrator should be removed or not, and that this court should presume that they were so examined and considered. We cannot accede to this view. Such a rule would leave the lower court no guide in making up a bill of exceptions, and lead to utter confusion. A party who desires that any item of documentary evidence shall be considered by the court must call the attention of the court to it, and offer it in evidence. In no other way can it be regarded as a part of

torneys was not directed to the loose form in which the introduction of the deed was stated in the transcript. The statement was made before the amendment of the Practice Act, and only specifies in general terms that insufficiency of the evidence to support the finding will be one of the grounds relied on."

⁸² *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269.

⁸³ 78 Cal. 242, 244, 20 Pac. 558. This case was an application to the supreme court to settle a bill of exceptions on an appeal. When the appeal came before the court, *Estate of Moore*, 83 Cal. 583, 587, 23 Pac. 794, the court said: "Here there was no evidence at all introduced in support of the charge of wrongfully prolonging the administration. The only theory upon which the finding can be supported is that all the papers filed, being matters of record in the proceedings might be considered by the court as evidence in the case. But when the appellant applied here for an order for the insertion in the bill of exceptions of some of the papers filed in the proceedings, the application was denied, on the ground that they had not been offered in evidence. The fact that they had been commented on at the argument was held not to be sufficient to entitle the party to have them considered as evidence."

the evidence, independent of some stipulation of the parties. It need not be read in evidence, but must necessarily be offered, and thereby brought to the attention and consideration of the court. By no other means can the practice in this particular be made certain and uniform. Nor can we say as matter of law that the court was bound, in passing upon this question, to examine and consider all of the papers in the estate. Again, it is claimed that some, if not all, of these papers were commented upon at the argument below, and that they were thereby called to the attention of the court, and should, for that reason, be inserted in the bill of exceptions. But this will not do. Such a practice would lead to just what has taken place here, a controversy between opposing counsel as to what, if anything, was referred to."

§ 273. No exception considered unless objection made at time of offer, unless postponement by consent.

That a party must object at the time of the offer of evidence, and not wait with the intention of endeavoring to get rid of it by motion to strike out, is a rule applicable to criminal as well as civil cases.⁸⁴ And if a party would avail himself of error by the court in asking questions of witnesses, he must object and except as in other cases.⁸⁵ The action of the court in asking questions and eliciting evidence cannot be presented for review under the head of irregularity. In *Woods v. Jensen*,⁸⁶ the court said: "One of the grounds of the motion for new trial was 'irregularity in the proceedings of the court'; and this cause

⁸⁴ *People v. Smith*, 121 Cal. 355, 53 Pac. 802; *People v. Long*, 43 Cal. 444, 446; *Livermore v. Stine*, 43 Cal. 274; *People v. Rolfe*, 61 Cal. 540, 542; *Wright v. Seymour*, 69 Cal. 122, 128, 10 Pac. 323; *People v. Samaria*, 84 Cal. 484, 485, 24 Pac. 283; *People v. Nelson*, 85 Cal. 421, 426, 24 Pac. 1006; *Way v. Johnson*, 5 S. Dak. 237, 58 N. W. 552; *Vermillion Well Co. v. City*, 6 S. Dak. 467, 61 N. W. 802. In *People v. Rodriguez*, 10 Cal. 59, the effect of a failure to object to a confession by one accused of crime without a prior showing that it was voluntary was held to be to shift the burden to the defendant to show that it was not voluntary.

⁸⁵ *Woods v. Jensen*, 130 Cal. 200, 206, 62 Pac. 473, holding, also, that the action of the court in such case cannot be made available under the head of "irregularity in the proceedings of the court."

⁸⁶ 130 Cal. 200, 205, 62 Pac. 473.

for a new trial is based entirely upon certain questions asked by the court of appellant's witness which appellant claims should not have been asked. These questions appear in the statement as occurrences which took place at the trial; but no exceptions were taken to them, and there is no affidavit in respect to them. Under sections 657 and 658 of the Code of Civil Procedure, 'irregularity in the proceedings of the court' must be 'made upon affidavits.' It is quite evident that the ground for a new trial is intended to refer to matters which an appellant cannot fully present by exceptions taken during the progress of the trial, and which therefore must appear by affidavit. An inadmissible or improper question asked a witness during the progress of a trial, whether asked by counsel or court, must be excepted to, or advantage of it cannot afterward be taken. The fact that such occurrences as those here objected to appear in a bill of exceptions or a statement without any exceptions having been taken to them is of no consequence. Appellant contends that respondent should have objected to having these occurrences put into the statement; but respondents are not in a position to object to anything done by a court which rendered a judgment in their favor, and, moreover, why should they object to something that was of no importance?" The rule is not referable to section 646 of the Code of Civil Procedure of California, which provides that "an exception is an objection upon a matter of law to a decision," etc., nor is it referable to any code provision. It is one of the long-established rules of practice, which is not only reasonable and convenient, but well nigh indispensable in the administration of justice. And the right to object to inadmissible evidence is one not confined exclusively to litigants, but the court may well exercise its power to exclude evidence. For as was said in *Parker v. Smith*:³⁷ "The duty of the court is not confined to passing upon such portions of testimony as may be excepted (objected) to, but extends to the preservation of the rights of litigants, and a proper disposition of the matters in controversy." As to what amounts to the exclusion of evidence by the court without an objection is sometimes important. Nothing more definite can be said than that it requires some expression by the court of an intention that the evidence shall not be considered in determining the issues. A

³⁷ 4 Cal. 105, 106.

mere statement that the matter which has come in was not evidence in the case was held not to exclude it, as where upon a witness stating what the proponent of a will had stated the court said, "That is not evidence. Declarations of the proponent before the date of the will are not evidence in this case," to which the contestant excepted, neither party moving, however, to strike out the evidence.³⁸ Various reasons have been assigned from time to time for this wholesome rule, requiring objection to be made at the time of the offer. It has sometimes been referred to the doctrine of estoppel; and it was said in one case that courts will not permit a party to give an apparent acquiescence which will operate to mislead and entrap his adversary, and referred to the existence of a legal presumption that upon the presentation of the objection in proper time the party offering the evidence would bring forward other evidence against which the objection could not be successfully urged.³⁹ While the above would be sufficient in the absence of a better, there is a more practical basis for this rule. That which vitiates a verdict in case of the improper admission of evidence is the ruling of the court upon the question of law presented by an objection, and if the party seeking to set aside the verdict and obtain a new trial, or to secure a reversal, be not in a position to take advantage of an erroneous ruling, he cannot object that the evidence was improperly admitted.⁴⁰ The practical application of the rule was well illustrated in the case of *Satterlee v. Bliss*.⁴¹ The record showed as follows: "Witness testified: 'I am an attorney; I have been practicing in this city and county several years; I know defendants in this suit.' Defendant's counsel objected to this testimony, as immaterial and irrelevant, and as requiring of the witness what he knows by no means except through his professional relation with his client. The court overruled the objection. Defendant's counsel duly excepted." In passing on the point the supreme court remarked: "The testimony was certainly relevant and material, and it is too late to raise, for the first time, the objection on the ground of privilege."

³⁸ *Estate of Brooks*, 54 Cal. 471.

³⁹ *Goodale v. West*, 5 Cal. 339, 341.

⁴⁰ *McCloud v. O'Neill*, 23 Cal. 393, 697, 83 Am. Dec. 123.

⁴¹ 36 Cal. 489, 510.

§ 274. Same subject—Application of rule to offer of secondary evidence.

The rule has been frequently applied where secondary evidence was offered and admitted in the absence of an objection based on the ground that it was not the best evidence; for instance, where a copy of a conveyance was admitted without objection that the loss of the original was not shown.⁴² And where, without objection, an executor was permitted to testify to expenditures for the support of minors, and to the contents of letters acknowledging payments, it was held that his charges therefor were sufficiently vouched, in the absence of counter-evidence.⁴³ Closely allied to the rule requiring the absence of the best evidence to be pointed out, when inferior evidence is offered, is that requiring the objector to specify the failure of the party offering evidence to lay a foundation for it if that is the real objection available.⁴⁴

§ 275. Same subject—Application of rule to offer of privileged communications.

The particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate, are well known. Some of these relations are recognized as furnishing exemptions independently of statutes on the subject, either entirely or to a limited extent. Statutes are found on the subject in various states. The exemptions declared by section 1881 of the Code of Civil Procedure of California are numerous and complete as regards the persons and relations mentioned. Upon cursory reading of the section the language would appear so far prohibitive as to dispense with an objection, and impose upon the court the duty to exclude of its own motion, or grant a motion to strike out, or instruct the jury to disregard, evidence of the

⁴² *Rewick v. Goldstone*, 48 Cal. 554. To same effect, *Mayo v. Mazeaux*, 38 Cal. 442; *Goode v. Smith*, 13 Cal. 81; *John v. Kidd*, 26 Cal. 270; *Janson v. Brooks*, 29 Cal. 223; *Rewrick v. Goldstone*, 48 Cal. 555; *Frink v. Alsip*, 49 Cal. 103; *Wright v. Roseberry*, 81 Cal. 87, 91, 22 Pac. 226; *Braley v. Reese*, 51 Cal. 447, 462.

⁴³ *Estate of Hilliard*, 83 Cal. 423, 23 Pac. 393.

⁴⁴ *People v. Frank*, 28 Cal. 507, 519; *People v. Mahoney*, 77 Cal. 529, 20 Pac. 73; *People v. Eckman*, 72 Cal. 582, 14 Pac. 359; *People v. Owens*, 123 Cal. 482, 56 Pac. 251.

character described with or without an objection, framed with special reference to the exemption. The understanding and administration of the law has been otherwise; and it is generally held that the exemption must be claimed in the form of an objection specially directed to the privilege. Of course, there is much less reason for relieving a party who has introduced such testimony, than in case of its introduction by the opposite party without his having interposed the objection. In *Wheelock v. Godfrey*,⁴⁵ the witness was a practicing physician, who, as such, had attended the deceased, whose mental condition during the last few months of his life was in dispute. The plaintiff elicited from him considerable testimony as to knowledge acquired in that relation, without objection, from defendant. At the close of his testimony plaintiff moved to strike it out. In passing upon the point the supreme court said: "The question then presents this proposition: Can a party to an action introduce testimony which in the face of an objection would be incompetent, and upon discovering that it militates against him, strike it out without the consent of the opposite party? The question must be answered in the negative. By offering the witness and eliciting testimony from him, he in effect declared the witness was competent and the testimony proper. In the absence of objection by defendants, it was the equivalent of consent, and was as binding upon them as a written stipulation agreeing to the competency of the witness to testify to the given facts would have been. The motion came too late." But as before stated, the same strict rule of diligence in objecting is applied where an objection would be available with reference to privileged communications, if made in proper time, as in ordinary cases, and has been applied alike in criminal and civil cases.⁴⁶

Where an objection to evidence that it tends to prove an estoppel and that no estoppel has been pleaded might be available to a party, if interposed at the proper time, and he fails to object on that ground, an exception to such evidence will not be entitled to subsequent consideration. Thus in *Flandreau v. Downey*,⁴⁷ where the record presented the above condition, the

⁴⁵ 100 Cal. 578, 583, 35 Pac. 317. See, also, *People v. Lang*, 43 Cal. 446; *People v. Samaria*, 84 Cal. 484, 24 Pac. 283.

⁴⁶ See ante, § 237.

⁴⁷ 23 Cal. 354, 358.

court said: "No objection was made to the introduction of this evidence, that the record had not been specially pleaded, and it is to be deemed as waived. If that specific objection had been made at the time, the court could have allowed the defendant to amend his answer by making the proper averments to authorize the admission of the proof and remove the ground of the objection."

§ 276. Sufficiency of objection—Requirement of specification, generally.

Where error in overruling objections to evidence is relied on, much often depends upon the form of the objection with reference to the presence or absence of specifications. The value of accurate knowledge herein and its judicious use in practice can scarcely be over-estimated. The number of cases in which the benefit of exceptions was lost for lack of it, is so great that full citation will not be attempted. There are degrees of generality, and degrees of particularity characterizing objections. Reference must be had to the issue and to what has preceded in each case, as well as to the law governing the subject, in order to determine the sufficiency of the objection in the respect now considered. "I object," is usually of no practical value, because it could only be available in case the evidence offered were entirely beyond the issue made by the pleadings; and where that is the case, the error in overruling the objection, though well taken, would be harmless and presumptively without injury, especially in trials by the court without a jury. And in many cases something more is necessary than a mere assignment of immateriality, irrelevancy and incompetency. An objection is a concrete legal argument against the admissibility of evidence to the benefit of which the court is entitled at the time the evidence is offered; and the court is no more bound to exclude evidence when not objected to in a form which calls its attention to the reasons for excluding it than it is to exclude a juror in the absence of a legal reason why he should not serve. The rule in question is not founded upon an undue favor for technicalities, but rather upon a disposition to avoid them, which is thus well expressed in *Rush v. French*:⁴⁸ "The object of requiring the grounds of ob-

⁴⁸ 1 Ariz. 124. See, also, *Crocker v. Carpenter*, 98 Cal. 418, 421, 33 Pac. 271; *Cochran v. O'Keefe*, 34 Cal. 554; *Snowden v. Pleasant*

jection to be stated, which may seem to be a technical rule, is really to avoid technicalities and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified so that the party offering the evidence can remove it if possible, and let the case be tried on its merits." Perhaps the most important among the reasons for requiring the party objecting to evidence to specify the grounds of his objection is that in many cases, if the exact ground of objection were pointed out, the party offering it could cure such objection by making the necessary preliminary proof, or in some other way.⁴⁹ Accordingly, an objection to the reading of a copy of a power of attorney executed, and of record in another state, without proof of the laws of the state on the subject, was refused consideration, on appeal, where the objection was general, and indefinite, and

Val. Coal Co., 16 Utah, 366, 52 Pac. 599. In *People v. Nelson*, 85 Cal. 421, 428, 24 Pac. 1006, the record with reference to all the rulings complained of showed merely "counsel for the defendant objected to the question asked in the deposition as to whether Davis recognized the man. The objection was overruled, and counsel for defendant excepted." The supreme court said, "The answer to this point is that no ground of objection was stated, and the well-settled rule is that a general objection to the admission of evidence is insufficient." In *People v. Chee Kee*, 61 Cal. 404 (citing *People v. Manning*, 48 Cal. 335; *People v. Hassey*, 48 Cal. 635), the court said: "A party objecting to evidence must specify the ground of his objection. If he does not, there is no error in overruling his objection, and an exception taken to the ruling is not revisable on appeal." Where a copy of a deed had been admitted in evidence, the only objection to it being general, the supreme court said: "The exclusion of such a document would have to be placed upon the ground that the copy was not the best evidence. But the objection was not made upon that ground, and a general objection is insufficient": *Eversdon v. Mayhew*, 85 Cal. 1, 10, 21 Pac. 431, 24 Pac. 382.

⁴⁹ See *Owen v. Frink*, 24 Cal. 171. *Estate of Gregory*, 133 Cal. 131, 65 Pac. 315, holding that a general objection, without specifying ground of incompetency, is insufficient, the court saying: "We cannot consider an objection made in general terms without some specification of the point of incompetency, if the evidence is admissible for any purpose." See, also, *Thompson v. Thraxton*, 50 Cal. 142; *Brumley v. Flint*, 87 Cal. 471, 25 Pac. 683; *Cracker v. Carpenter*, 98 Cal. 418, 33 Pac. 271.

was considered by the trial court as going only to the form of the recorder's certificate.⁵⁰

§ 277. Use of terms "irrelevant," "immaterial" and "incompetent."

Objections that evidence offered or called for by question is "immaterial," that it is "incompetent," that it is "irrelevant," or that it is "immaterial, incompetent and irrelevant" have often been held insufficient because too general, and are said to be so if not amenable to one or more of the grounds mentioned under any possible view of the case, the requirement being, as often expressed, that "the party should have laid his finger on the point at the time."⁵¹ An excellent illustration of the inapt use of these terms is afforded by the case of *Brumley v. Flint*.⁵²

⁵⁰ *Coleman v. Montgomery*, 19 Wash. 610, 53 Pac. 1102.

⁵¹ *Martin v. Travers*, 12 Cal. 243; *Cochran v. O'Keefe*, 34 Cal. 558; *Brumley v. Flint*, 87 Cal. 471, 474, 25 Pac. 683; *Walker v. Gray* (Ariz.), 57 Pac. 614; *Tanderup v. Hansen*, 8 S. Dak. 375, 66 N. W. 1073; *Park v. Robinson*, 15 S. Dak. 551, 91 N. W. 344. In *People v. Louie Foo*, 112 Cal. 17, 44 Pac. 453, it was held that an objection to the sufficiency of the identification of a pistol and cartridges was waived where no specific objection was made upon that ground, but only the general objection that the evidence was incompetent irrelevant and immaterial, and not connected with the defendant. But it would seem that such evidence "not connected with the defendant" should have been considered absolutely immaterial and irrelevant.

⁵² 87 Cal. 471, 473, 25 Pac. 683. In *Gardner v. Schmaelzle*, 47 Cal. 588, the objection made to a power of attorney offered in evidence, was that it was irrelevant and incompetent. The paper only pertained to "lots unsold." It was held that the objection did not cover the absence in the record of any evidence that the lots in controversy were intended by the term, "lots unsold." Apt illustration of the futility of the general objection is presented in *Wise v. Wakefield*, 118 Cal. 107, 110, 50 Pac. 310, where the court said: "A certain person was the agent of plaintiffs in a great part if not all, of the transactions which gave rise to the suit; he was called by them as a witness and testified in their behalf at great length. When defendant opened his case he called as his first witness the said agent of plaintiffs and examined him as to a single item of credit claimed by defendant his answer being unfavorable to the latter. Subsequently the defendant introduced a quantity of testimony to the effect that said witness' general reputation for truth, honesty, and integrity was bad. (Code Civ. Proc., § 2051.) It is contended that such testimony was improperly admitted and that defendant by the

That was an action for damages for trespass of defendant's cattle upon plaintiff's land. A witness was asked by plaintiff's counsel to state what amount of damage, in his estimation, was done by the cattle during the time they were trespassing upon the land. The defendant's counsel objected to the question "upon the ground that the same was incompetent, irrelevant and immaterial," as asking for a conclusion which the court was to arrive at from the facts given in testimony, and further, as not the proper way to prove damages." The court overruled the objection, and the witness answered giving the amount of the dam-

examination of the witness in his own behalf was precluded from impeaching his character. We are disposed to think this objection should have been sustained if it had been properly presented in the court below; but the only ground stated was that the testimony was 'incompetent irrelevant and immaterial'; the testimony was undoubtedly competent in the general sense and only incompetent because of the fact that defendant had made the impeached witness his own; and this ground was not specified; the point of the exception was not 'so stated as to be apparent to the court': *Nightingale v. Scannell*, 18 Cal. 315, 323. A like consideration applies to the further contention that evidence was wrongly admitted because not confined to the general reputation of the impeached witness for truth, etc., in the community where he resided; the broad objection of incompetency and irrelevance did not reach the point; the general reputation of a witness necessarily includes repute in the place of his residence, and if it was desired to restrict the inquiry to that place the objection should have been stated accordingly. Lastly, under this head, it is said that the court erred in allowing the question put to certain witnesses whether, on the general reputation for truth, etc., of plaintiff's said agent, they would believe him under oath. The question was competent (*Stevens v. Irwin*, 12 Cal. 306); we see no substantial ground for the view advanced that the rule in this respect has been changed by the enactment of section 2051 of the Code of Civil Procedure." And in *People v. Owens*, 123 Cal. 482, 490, 56 Pac. 251, counsel for the defendant contended in the supreme court that error was committed in the admission of the dying statement of the deceased, because it was not read over to her after it was written, and was only the substance of the questions and answers, and because the witness for the defense called after the admission of this statement gave testimony tending to show that when the statement was made by deceased she did not have the sense of impending death. The only objection was that urged to the admission in evidence of the dying statement was "on the ground that it is immaterial, irrelevant and incompetent." The supreme court said: "This does not cover any of the objections now urged against its

ages, according to his estimate. In the supreme court the defendant (appellant) urged that the ruling was erroneous, because the witness had not been "shown to possess the requisite knowledge of the value of the property claimed to have been injured by the defendant's cattle." The court refused to consider the exception on appeal, for the reason that the objection to the question was not well taken, saying: "It is not claimed that the answer to the question, if given by a competent witness, would have been incompetent, irrelevant or immaterial, and upon that question we are not called upon to express an opinion. It will be observed here that the objection was, not that the witness was incompetent, for want of sufficient knowledge, to testify as to the damages, but only that it was not proper to prove damages." In such a case as the preceding an objection "that a sufficient foundation for the evidence called for by the question has not been laid" would generally be sufficiently specific. That "the witness has not shown himself qualified to answer the question is, however, a still more specific form of objection. This branch of the rule is of considerable practicable importance. It is applicable in all cases where preliminary or qualifying evidence is necessary in order to render evidence admissible, and many illustrations can be found pertaining to documentary evi-

admission. It was material, relevant, and, in the absence of any more specific objection was competent." "We have repeatedly held that counsel must make their objection in such a manner as to leave no doubt as to the precise ground upon which it is placed. We do not think that that was done in the present case, and we do not think that we should be justified in reversing the judgment on this ground": *People v. Frank*, 28 Cal. 519. See, also, *People v. Mahoney*, 77 Cal. 532, 20 Pac. 73; *Satterlee v. Bliss*, 36 Cal. 507; *Mayo v. Mazeaux*, 38 Cal. 442; *Crocker v. Carpenter*, 98 Cal. 421, 422, 33 Pac. 271; *Colton etc. Co. v. Schwartz*, 99 Cal. 278, 284, 33 Pac. 878. In *People v. Louie Foo*, 112 Cal. 23, 44 Pac. 453, the court said: "The consensus of opinion, as illustrated by these cases and many others, is that where the proffered evidence is imperfect by the lack of preliminary proof which may or may not be supplied by the party offering the evidence, the objector may specifically point out the defect by his objection, and, if he fails to do so, it is waived and the general objections of 'immaterial, inadmissible, irrelevant, and incompetent,' made when the evidence is offered to the jury, are not sufficient to warrant an investigation on appeal of the insufficiency of such preliminary proof."

dence. Thus, in *Crocker v. Carpenter*,⁵³ the court had admitted in evidence the answers of certain defendants in an action brought against them by a certain party, concerning the land in controversy in the above action. These answers so admitted had never been verified by the defendants against whom they were offered, nor signed by them, and there was no evidence showing that they knew the contents of such answers when filed, or that they ever authorized the attorneys signing them to make the statements therein contained. The defendants objected to the admission of these answers upon the general grounds of incompetency, irrelevancy, and immateriality; also as not being in rebuttal. In passing upon the exception of the appellants to the ruling of the lower court, admitting them in evidence, the court said: "We think there was no error in overruling the general objection thus made. If the defendants desired to object to the offered evidence upon the ground that the proper foundation for its admission had not been laid because it had not been shown that the facts stated in such answers were inserted with the knowledge of defendants, the objection should have been specifically pointed out and called to the attention of the court and the opposing counsel. If this specific objection had been made, it is possible that it could have been removed by further evidence upon the part of plaintiff's showing such knowledge; but the general objection that the offered evidence was incompetent was not sufficient."

§ 278. Same subject—Question of competency not raised by objection to relevancy and materiality.

It is obvious that the meaning of relevancy, materiality and competency, and the proper occasions for the use of these terms respectively cannot be here fully considered. But it may be observed that while the terms "immaterial" and "irrelevant" are often interchangeable for each other, it seldom occurs that either of them will perform the office of the term "incompetent."⁵⁴ Therefore, incompetency of evidence is waived if not

⁵³ 98 Cal. 418, 421, 33 Pac. 271.

⁵⁴ *People v. Manning*, 48 Cal. 335, 338; *Burke v. Koch*, 75 Cal. 356, 359, 17 Pac. 228. In the first of these cases the court drew the following practical distinctions between incompetent and immaterial evidence: "There is a wide distinction between immaterial and in-

objected to on that specific ground;⁵⁵ and, when so admitted, it must, if material, be considered.⁵⁶ On the same principle, if an incompetent witness be permitted to give positive testimony without objection, such testimony cannot be disregarded.⁵⁷

§ 279. Same subject—Illustration of rule that “party must place his finger on the precise point of objection.”

One of the best illustrations to be found of the meaning of the expression that the objector must “lay his finger upon the precise point” is found in the case of *People v. Mahoney*.⁵⁸

competent evidence. It may be material and tend to prove the issue, but incompetent for that purpose under the rules of law. On the other hand, it may be competent evidence in a proper case, but immaterial to any issue before the court. A party objecting to the admission of evidence must specify the ground of his objection when the evidence is offered, and will be considered as having waived all objections not so specified. To have entitled the appellant to raise the point in this court as to the competency of the evidence under the code, he should have made the objection on that ground in the court below”; and in the second case the court said: “The statement shows that ‘plaintiff offered in evidence, as admissions made by Jacob Koch as to why he took the property, and his knowledge of the circumstances of Mr. Zech, and also showing he was told the value, the testimony of Mr. Koch taken at the trial of the opposition to the discharge of Jacob Zech in insolvency.’ The evidence was objected to by defendant as ‘irrelevant and inadmissible’; objection was overruled, and defendant excepted. The evidence following this offer and ruling appears to be a transcript of the sworn testimony of Koch, but is not shown to be such except by the statement above quoted. The evidence was not irrelevant if it was in fact a statement made by Koch, and the objection that it was inadmissible was insufficient to test the question of its competency. The ruling is, therefore, not shown to be erroneous.”

⁵⁵ *Yetzer v. Young*, 3 S. Dak. 263, 52 N. W. 263.

⁵⁶ *Locke v. Hubbard*, 9 S. Dak. 364, 69 N. W. 588.

⁵⁷ *Drew v. Insurance Co.*, 6 S. Dak. 335, 61 N. W. 34.

⁵⁸ 77 Cal. 529, 532, 20 Pac. 73. See, also, *Fabian v. Callahan*, 56 Cal. 159, 161. In the second case the court said: “The evidence was competent and to entitle an objection to an offer of competent evidence to notice, it must not only be on a material matter, affecting the substantial rights of the parties, but its point must be particularly stated. As has been said, the party must lay his finger on the point of his objection to the admission of evidence (*Kiler v. Kimball*,

The prosecution had asked a physician and surgeon who conducted the autopsy, whether from his examination of the wound and the course of the bullet, it would have been in his opinion possible for the deceased to have shot himself. The question was objected to by the defendant's counsel "as incompetent, no foundation having been laid for it." The district attorney, without pressing the question, proceeded to examine the witness as to his experience and qualifications. The record proceeds thus: "If from the position this bullet went in the clothing, tell us whether or not, in your opinion, the deceased could have shot himself? Objected to by defendant's counsel as incompetent and irrelevant, no foundation being laid for the testimony. The court overruled the objection, to which ruling the defendant by his counsel excepted." The witness then answered. The gist of the view taken of the point here presented in the supreme court was that an objection to the competency of the testimony sought by the question would have been well taken, but that with the qualifying clause it was an objection specifying the absence of a foundation which had been supplied by the prosecution.

§ 280. Same subject—Slight variance from allegations must be pointed out.

Of course, there may be so wide a variance between evidence offered and the issue that any objection, however general, will be sufficient to exclude it; but where the variance is technical, or not so marked but that the pleading could be amended so as to render the evidence admissible, the variance should be pointed out by the objector, and in such case an objection simply that the evidence is irrelevant is insufficient. Thus, where a certified copy of an assessment-roll affecting certain property in dispute did not show that the property was assessed in the name of the plaintiff, and would not have been admissible if the variance had been suggested, and yet a slight permissible amendment of the complaint would have obviated the objection, and the objection was overruled, the supreme court said:⁵⁹ "It

10 Cal. 268; *Martin v. Travers*, 12 Cal. 243), unless it is absolutely incompetent: *Nightingale v. Scannell*, 18 Cal. 324.

⁵⁹ *Knox v. Higby*, 76 Cal. 264, 268, 18 Pac. 381. See, also, *Larkin v. Mullen*, 128 Cal. 449, 60 Pac. 1091 *Yik Hon v. Spring V. W. W.*,

is clear, from an inspection of the complaint that the exhibit was in support thereof, and the defendant, if he had intended to rely on any variance between the allegations and the proof offered, should have made the point then and there, so that, if it were well taken, the court might have allowed an amendment of the complaint." No mere defectiveness in a complaint will avail a party as against a record showing no objection to evidence at the trial. In *Larkin v. Mullen*,⁶⁰ the court said: "The most that can be said of the complaint in this particular is, however, that the fact of fraud is defectively alleged, rather than that there is an absence of any allegation of fraud. Under these general allegations it was competent for the plaintiff, if no objection was made thereto, to introduce evidence of the facts constituting the fraud, and the finding of the court upon that subject was within the issue before it. As it must be assumed that such evidence was introduced without any objection thereto on the part of the defendant, it may also be assumed that it was received by the court with his consent. It is too late for a defendant 'after verdict' to object to defective allegations in the complaint, which, if he had pointed them out by specific demurrer before the trial, or by the objections to the evidence at the trial, might have been obviated by amendment."

§ 281. Same subject—With reference to time to which offered evidence relates.

So, where the admissibility of evidence depends upon its being limited to a period near that of the transaction under consideration, that specific objection should be presented. Accordingly, where the action was against a railroad company for damages from fire, it was held that an objection to a question as to the occurrence of other similar fires on the defendant's road should, in order to be available, have specified that the

65 Cal. 619, 620, 4 Pac. 666; *James River Nat. Bank v. Purchase*, 9 N. W. 280, 83 N. W. 7; *Erickson v. Bank*, 9 N. Dak. 81, 81 N. W. 46; *Chilson v. Bank*, 9 N. Dak. 96, 81 N. W. 33; *Wylly v. Grigsby*, 11 S. Dak. 491, 78 N. W. 957.

60 128 Cal. 449, 453, 60 Pac. 1091. See, also, *Harnish v. Bramei*, 71 Cal. 155, 11 Pac. 888; *Mendenhall v. Paris*, 84 Cal. 193, 23 Pac. 1095; *Amestoy v. Electric Rapid Transit Co.*, 95 Cal. 311, 30 Pac. 550; *Bliss v. Sneath*, 103 Cal. 43, 36 Pac. 1029; *Mullally v. Townsend*, 119 Cal. 47, 50 Pac. 1066; *Place v. Minster*, 65 N. Y. 89.

question was not limited to some recent period, and that an objection that the question was “irrelevant and immaterial” was insufficient.⁶¹

§ 282. Same subject—Application of rule to expert testimony.

Where an objection is made to a question asked of a witness called to testify as an expert, it must, if error is to be assigned for overruling it, definitely specify the ground of objection. Thus, where a physician called to give his opinion as to the cause of miscarriage suffered by a woman, in an action for damages, had listened to the testimony of another physician, and was asked a question calling for his opinion, based hypothetically upon the opinion of the other physician as expressed in his testimony, and the objection was merely that it was “irrelevant, immaterial and incompetent, and not a proper hypothetical question,” it was held that the objection was too general, and that the objector should have pointed out that the opinion called for by the question was not one based upon a statement of facts, but upon an opinion.⁶² The rule under consideration rests upon the general principle of convenience and fairness, well expressed in an Arizona case, where the court said: “The object of requiring the grounds of objection to be stated, which may seem to be a technical rule, is really to avoid technicalities and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified, so that the party offering the evidence can remove it if possible and let the case be tried on its merits.”⁶³ And the principle was exemplified in *Howland v. Oakland etc. St. Ry. Co.*,⁶⁴ where the court, after discussing facts and general principles, said: “For like reasons, the general objection made did not sufficiently point the further specific objection now urged, that it was improper, in framing the hypothetical question, to refer the witness generally to the facts testified to by Dr. Huntington, as a basis for his opinion, but that the question itself

⁶¹ *Steele v. Pacific Coast Ry. Co.*, 74 Cal. 323, 15 Pac. 851.

⁶² *Howland v. Oakland C. St. Ry. Co.*, 110 Cal. 513, 519, 42 Pac. 983.

⁶³ *Rush v. French*, 1 Ariz. 124, 25 Pac. 816.

⁶⁴ 110 Cal. 513, 521, 42 Pac. 983.

should have contained a statement of such facts. Obviously, the general and sweeping suggestion 'not a proper hypothetical question' would not be calculated to direct the court's or opposite counsel's attention to what objection was aimed at. It might refer to one of a dozen supposed reasons why the question was deemed improper. If, however, the objection were sufficient to raise the point, we are not prepared to hold that, in an instance such as this, where the witness has heard a statement of facts by another, it is not sufficient, in putting the question, to direct his attention to such statement as the basis upon which his opinion is desired."

§ 283. Same subject—Application of rule to opinion as to market value.

The reasonableness and justice of the rule requiring objections to point to the really objectionable quality or feature of the question was clearly stated in *Eachus v. Los Angeles etc. Ry. Co.*⁶⁵ For the purpose of ascertaining the amount of damage that the plaintiffs had sustained, witnesses were asked, "What effect did the cut have upon the value of the property?" and, upon replying that its effect was to depreciate the value, they were asked, "To what extent?" and in reply stated the amount. These questions were objected to by the defendant upon the ground that they were incompetent, irrelevant and immaterial. It was urged on appeal that the opinions of the witnesses should have been limited to the market value of the property before and after the grading was done. But the supreme court, affirming the judgment and ordering a new trial, said: "If this special objection had been made at the trial, the plaintiffs could have asked the questions in such a form as to obviate the objection; but it is well settled that, unless the evidence is inadmissible for any purpose, a party is not at liberty under this general objection afterward to urge a special objection, which goes merely to the form of the question by which the evidence is sought."

⁶⁵ 103 Cal. 614, 622, 42 Am. St. Rep. 149, 37 Pac. 750. Citing *Crocker v. Carpenter*, 98 Cal. 418, 33 Pac. 271. See, also, *People v. Baird*, 105 Cal. 126, 38 Pac. 633.

§ 284. Same subject—With reference to change of condition by lapse of time.

A specific objection, sometimes overlooked, relates to change in the condition of physical condition of articles offered in evidence, wrought by lapse of time. Thus where, in a prosecution for homicide, the coat of the deceased, showing the hole made by the bullet of his assailant, was offered in evidence, the counsel for defendant objected on the ground that the best evidence was the testimony of the doctor as to the wound, and that that was superior to any holes in old clothes, was held not well taken; that, in order for the defendant to avail himself upon appeal of the further objection that the coat was not shown to have been in the same condition at the trial as when taken from the body of the deceased, that specific objection should have been taken in the court below.⁶⁶

§ 285. Same subject—With reference to question impeaching party's own witness.

Where a party seeks by a question propounded to his own witness to impeach his credibility, the witness having given an unfavorable answer to a previous question, that being the only available objection to the question, an objection to the relevancy, materiality and competency of the evidence is insufficient. The specific objection must be made.⁶⁷

§ 286. Same subject—Phraseology of objection.

Courts may not be unduly technical as to the form of objections, and the fact that an objection might be in better form is not alone sufficient reason for disregarding it.⁶⁸ But, although slight inaccuracies of phraseology will not be regarded, if the sense be clear, yet language cannot be construed to give it an entirely different meaning to that which it imports; and it was held that an objection to testimony of an attorney that "it is not shown that he was not acting in the capacity of client to an attorney," was not sufficient to raise the question of his competency to testify.⁶⁹

⁶⁶ *People v. O'Brien*, 78 Cal. 41, 20 Pac. 359.

⁶⁷ *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310.

⁶⁸ *People v. Yee Fook Din*, 106 Cal. 163, 39 Pac. 530.

⁶⁹ *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482.

§ 287. Same subject—Application herein of the doctrine of waiver.

Objections not specified are deemed to be waived. Where a party objected to a certified copy of a recorded instrument on the ground that it was "not duly certified and proved," he was held to have waived the objection that the original was not produced, or not shown to be under the control of the party offering the evidence.⁷⁰ And the objections that evidence is introduced out of its proper order, that no proper foundation was subsequently laid, as was promised or expected, that the proper connection was not made with the issues in the case upon which the relevancy and competency of the evidence admitted depends, will be treated as waived if, upon failure therein, no motion is made to strike it out. An excellent illustration of this appears in the opinion in *Crossett v. Whelan*,^{70a} as follows: "At the trial, when the plaintiff rested, the defendants proceeded to introduce the evidence in support of the special agreement set up in the answer, to which the plaintiff objected, on the ground that the testimony was irrelevant, until after it had been shown either that the plaintiff took the note with notice or acquired it after maturity; but the court decided that the defendants might introduce their evidence in whatever order they preferred, and that he would afterward rule it out, unless its relevancy was shown. No objection was made to the evidence on the ground that it was incompetent. The evidence as to the special agreement was then put in by the defendants, and no motion was afterward made to exclude it, nor did the court of its own motion rule it out. In the statement on motion for a new trial, under the head of errors of law occurring at the trial, this ruling of the court, and this only, was specified as error and is relied upon here. But the ruling was not erroneous. A party is at liberty to introduce his evidence in whatever order he prefers, subject to the control of the court, in the exercise of a sound discretion, and in this ruling there was no abuse of discretion. If the defendants afterward failed to show the relevancy of the testimony, the plaintiff had the opportunity to move to exclude it on this ground; but no such motion was made, and it is too late to raise the objection here

⁷⁰ *Mayo v. Mazeaux*, 38 Cal. 442.

^{70a} 44 Cal. 200.

for the first time.” This principle of waiver as above expressed is but another form of saying that the party attempting to “place his finger upon the point of objection” must do so, and must not place it on the wrong point. Thus, in *Lee v. Murphy*,⁷¹ upon the setting aside of a submission upon an affidavit of plaintiff setting forth newly discovered facts which she desired to put in evidence, plaintiff testified at considerable length as to several different relevant matters, at the conclusion of which defendant moved to strike out her testimony on the ground that in the affidavit upon which permission was granted to take further testimony, she stated that she had discovered new facts, whereas her testimony showed she must have known those facts all the time. The motion was denied, and the supreme court held there was no error, saying: “Her testimony was not confined entirely to facts of which she showed she had previous knowledge. The objection was too broad. Her testimony tended to establish other and independent facts.”

§ 288. Exception to rule—When general objection sufficient.

If the question is objectionable from every standpoint, the court is not aided in making an intelligent ruling by a specific objection, and then the specific objection is not required. There is no reason for it, and where the reason is not present the rule fails.⁷² In *Nightingale v. Scannell*⁷³ the record as to the way

⁷¹ 119 Cal. 364, 367, 51 Pac. 549-955. See, also, *People v. Manning*, 48 Cal. 338; *Brumley v. Flint*, 87 Cal. 474, 25 Pac. 683; *Bailey v. Railway Co.*, 3 S. Dak. 531, 54 N. W. 596; *Prior v. Sanborn Co.*, 12 S. Dak. 86, 80 N. W. 169; *Baumner v. French*, 8 N. Dak. 327, 79 N. W. 340; *O’Keefe v. Dyer*, 20 Mont. 477, 52 Pac. 196. An exception to a ruling sustaining an objection to a preliminary question is not available unless followed by an offer of proof: *Tootle v. Petrie*, 8 S. Dak. 86, 80 N. W. 169; *Baumer v. French*, 8 N. Dak. 327, 79 N. W. 156. When the deposition of plaintiff was read without objection, and at the time of reading it, permission was asked and leave given, without objection, to call plaintiff himself in rebuttal, it was held that the defendant could not afterward have the deposition stricken out on the ground that plaintiff had personally attended court and testified in his own behalf: *Sherwood v. City of Sioux Falls*, 10 S. Dak. 405, 73 N. W. 913.

⁷² *Swan v. Thompson*, 124 Cal. 193, 196, 56 Pac. 878. See, also, *Arnold v. Producers’ Fruit Co.*, 128 Cal. 637, 61 Pac. 283.

⁷³ 18 Cal. 315, 319, 323.

in which the objection was made ran thus: "Q. What was the retail market price of coal oil at and about the 1st of October, 1865? The counsel for defendants here objected to the question, but the court overruled the objection and admitted the question, to which ruling the counsel for defendants then and there excepted." In passing upon the sufficiency of the objection the supreme court said: "The action of the court in that respect is assigned as error; but the plaintiff claims that if an error was committed, the defendants are not in a situation to take advantage of it. He contends that a general objection is not sufficient to support the assignment, and that in all cases a specification of the grounds of an objection is necessary to render it effectual. The defendants claim that the evidence was not admissible for any purpose, and that a statement of the grounds upon which it was objected to would have been superfluous, and was not therefore required. This view is based upon what appears to us to be the proper rule in such cases, and we see no good results to be accomplished by holding parties to more strict and rigid practice in these matters. The Practice Act provides that where an objection is made and an exception taken, the point of the exception shall be stated; but it does not follow that a general objection to the admission of incompetent evidence is not sufficient. On the contrary, the incompetency of the evidence sufficiently indicates the ground of the objection, and the point of the exception is as clearly perceptible as if it were expressed in words. We do not understand the provision referred to as requiring anything more than that the point of the exceptions shall be so stated as to be apparent to the court; and whether it be stated in express terms or appear by necessary implication from the nature and subject matter of the objection is immaterial. There is no doubt that a general objection to the introduction of evidence will not be available unless the evidence objected to is absolutely incompetent; but where that is the case, we do not see upon what principle such an objection could be held to be insufficient. Nothing more is required to put the adverse party upon notice that the competency of the evidence is called in question; and if an error intervene on account of its admission, we think that the generality of the objection should not be received as an answer." Counsel for respondents in the above case relied

case turns upon a question touching the relevancy or incompetency of certain offered evidence, and in such event it would be entirely proper for the court to take the question under advisement, where neither party could be prejudiced by such a course. On the other hand, the practice, which seems nowadays to be too freely indulged in, might in some cases seriously embarrass a party who, not knowing what the final ruling would be, could not determine what further evidence he should introduce. Therefore, whether such practice would be ground for reversal in any given case would depend upon the particular circumstances of that case." The above language leaves the subject in a state of some uncertainty. A line of discrimination is found, however, in a decision of the same court antedating all those above mentioned,⁸⁰ where it was stated that

⁸⁰ *Sharpe v. Lundy*, 34 Cal. 611. When the court on the introduction of testimony informed counsel that it was improper and would probably be excluded from the jury, it was held not error for the court on its own motion to withdraw the testimony from the jury at the close of the trial: *First Nat. Bank v. Home Ins. Co.*, 33 Or. 234, 52 Pac. 1055. If the court makes a ruling on demurrer during the progress of the trial, the party in whose favor the ruling is made is entitled to have the case decided according to the ruling, where, if the ruling had been against him, he might have been able to remove the objections made by the other party by amendment: *Jeffree v. Walsh*, 14 Nev. 143. In this case the court said: "The court rendered a judgment in favor of defendants for their costs. The statement on motion for a new trial shows that the court rendered this judgment upon the ground: 'That the plaintiff's complaint nowhere stated or alleged that defendant had ever executed the official bond of Samuel Symons as public administrator, and that otherwise the court found a good cause of action on the merits.' After the court had rendered its decision plaintiff's counsel 'asked leave to so amend his complaint as to allege, in terms, that defendants had executed the said bond in accordance with the proofs in the case. The court declined to allow plaintiff to so amend his said complaint for the reason that it was too late, because the case had been submitted and decided.' Upon this statement of facts it is evident: first, that the court erred in not sustaining the demurrers interposed by the defendants; second, that upon the trial, or at least before rendering its decision, the court became convinced of its error, for it rendered a judgment in favor of the defendants on the very ground upon which it ought to have sustained the demurrers in the first instance. The plaintiff was misled by this action of the court. If the demurrers had been sustained, the plaintiff would then have had an opportunity to amend his complaint so as to state a cause of action against the defendants; but

such reservations should not be made without the consent of parties, in cases where the consequences of the ruling might be obviated by other evidence by the party against whom the ruling is finally made, and that in all cases of the reservation, during the progress of the trial, of a ruling upon evidence subject to further consideration and future decision as to its admissibility, it is the duty of the judge, when the decision is made, to distinctly and expressly rule upon it one way or the other. From this it is fairly inferable that if the ruling be in favor of the objecting party no error could be predicated upon it; if against him this would depend upon the question whether it was apparent from the record and circumstances that the result of the ruling might have been obviated if made when the objection was presented. In a later case,⁸¹ the error urged in the appellate court consisted in the failure of the trial court to decide a reserved question upon the admissibility of evidence at all. The court cited its prior decision, discouraging the practice of deferring rulings upon the admissibility of proffered evidence, declaring as a result of its review that to do so was not necessarily erroneous; but it was held to be so in that case because had the court made its ruling in due season the appellant might have protected himself by introducing other evidence. In the same case the court declared, as a general principle, that where a ruling is reserved, the court should make its ruling at such time and under such circumstances as will allow the party against whom the ruling is made to supply other testimony, if that proffered and taken is rejected, provided he desires to, and can do so; and, if the testimony is admitted, the ruling should be made in such time and under such circumstances as will allow the party against whom it is admitted, to rebut the same if in his power so to do.

having overruled the demurrers, the plaintiff had the right to anticipate that the court would adhere to its ruling, and he ought not to be compelled to incur the additional expense of another action. We are of opinion that the court erred in refusing to grant a new trial for the purpose of allowing plaintiff to amend his complaint."

⁸¹ *Raymond v. Glover*, 122 Cal. 471, 477, 55 Pac. 398. In *Ramboz v. Stowell*, 103 Cal. 588, 37 Pac. 519, error in failing to decide and in taking the objection under advisement was held to be without prejudice, the evidence admitted being either properly admitted or harmless.

A different condition is presented where the court states, at the time evidence is admitted, that it will limit its purpose by instruction to the jury, which it does at the close of the evidence. An instance of this kind, and the view taken by the appellate court appear in *First Nat. Bank v. Home Ins. Co.*,⁸² where the court said: "There was timely notice that the court would withdraw the objectionable testimony except for the purpose of impeachment. After this other testimony was introduced of the same nature, part of which was objected to at first, then objection withdrawn, and part without objection; so that both parties had notice of the court's intention to unburden the case of this objectionable matter, which notice was kept good when the case was submitted to the jury. Neither of the reasons for the rule above alluded to can apply here, and it is not apparent that the jury was misled by the voluntary action of the court, to the prejudice of the appellant."

The ruling upon which error is predicated must be an unqualified ruling. If the judge's language in making his ruling leave the impression that the ruling is not final, and that if the question be raised subsequently during the trial the ruling may be different, it is the duty of the party against whom such merely tentative ruling is made to in some way bring the matter again before the court. And in such a case, where a defendant in a criminal case, whose proffered testimony was denied "for the present," failed to subsequently renew the offer, or to obtain an ultimate decision on his previous offer, it was held that he must be considered as having waived the point.⁸³

§ 290. Error in ruling on offer to make proof—Evidence not actually offered.

It is often convenient, and the practice is common and permissible, for a party, in lieu of actually putting a witness on the stand, or producing the evidence, to offer to make proof of facts and obtain a ruling upon the offer, subject to such objections as are made at the time. This was done in *Hackett v. Manlove*,⁸⁴ no objection being made to the form of the offer,

⁸² 33 Or. 234, 238, 52 Pac. 1055.

⁸³ *People v. Sanford*, 43 Cal. 29.

⁸⁴ 14 Cal. 85, 90.

and the supreme court said: "We must presume, for the argument, that he could have maintained it (his offer), if permitted; and, therefore, reverse the judgment, that the case may be retried upon the principles of this opinion." But the trial court may require that the witness be placed on the stand, sworn and interrogated as a condition to ruling on the admissibility of the evidence offered.⁸⁵ And it is in the discretion of the court to require counsel to reduce to writing the substance of evidence about to be offered, in order to determine its competency, though opposing counsel do not object to an oral statement of such evidence.⁸⁶

§ 291. Offer of evidence en masse—Proper practice.

The accepted rule on the subject of an offer of several matters or items of proof together is one of convenience; nor can any prejudice result from it except by the consent of the party against whom the offer is made, it being always his privilege to either specifically and severally object as the evidence is produced, or to require the parts to be offered seriatim. And it has been decided by the California supreme court that where an offer is thus made it will be construed, nothing appearing to the contrary, as an offer to prove the matters seriatim.⁸⁷ And it was held in a comparatively late case that an objection to the whole of an offer, part of which is admissible without specifying any part, was properly overruled.⁸⁸ In *Board of Education v. Keenan*,⁸⁹ the court thus explained the rationale of the rule as above stated: "When an offer is made of a mass of evidence, complex in its character, and the whole of it is objected to, in such case, if any part of it is admissible, it is error to exclude the whole." And it was held that an objection to the

⁸⁵ *Llsonbee v. Monroe Irr. Co.*, 18 Utah, 343, 72 Am. St. Rep. 784, 54 Pac. 1009.

⁸⁶ *Quinn v. White* (Nev.), 62 Pac. 995.

⁸⁷ *Lick v. Diaz*, 37 Cal. 446.

⁸⁸ *Woolridge v. Boardman*, 115 Cal. 74, 46 Pac. 868. See, also, *Biddick v. Kobler*, 110 Cal. 191, 196, 42 Pac. 578 holding that where there is an offer to prove several matters having no essential connection, it is not sufficient for the opposite party to address his objections to relevancy, competency and materiality, if aside from the irregularity in the method his objections are not well taken.

⁸⁹ 55 Cal. 642, 647.

introduction of certified copies of all proceedings in a criminal action, the papers being attached together, and objected to as a whole was properly overruled, part of the offer being clearly admissible, and no specification being made as to any particular paper so objected to.⁹⁰ So, in *Coveny v. Hale*,⁹¹ where a defendant offered in evidence a mass of papers to prove that a promissory note mentioned in an inventory, was the separate property of a married woman, and the objection was that the papers which were offered were irrelevant, immaterial, and not proof of the fact, it was held that the objection was too broad. But a decision was rendered in *Swafford v. Board of Education*,⁹² on an opinion written by Mr. Commissioner Cooper, which, if subsequently recognized, will thoroughly unsettle the law and change the practice herein. The profession supposed, and had a right to suppose, upon the foregoing authorities, that upon an offer to make proof of a variety of matters, some of which were objectionable, some not, and upon the mere general objection as to competency, relevancy, and materiality, a ruling against the offer would be held erroneous. It is true that a somewhat different rule applies where error is assigned in the exclusion of evidence from that which applies where it is admitted, with reference to showing error in the appellate court; but the rule could not be invoked against appellant in the above-mentioned case. The following is the record before the court and its opinion upon the record: "It is urged as the principal ground for reversal of the order denying the new trial that the plaintiff offered to prove that by resolution of defendant passed on the thirtieth day of June, 1890, the salary of the principal of the said high school was fixed at one hundred and sixty-five dollars per month, and that the court erred in refusing to hear such proof. The

⁹⁰ *Shafto v. Crocker*, 87 Cal. 629, 25 Pac. 921.

⁹¹ 49 Cal. 552.

⁹² 127 Cal. 484, 486, 59 Pac. 900. It was held, however, in *First Nat. Bank v. North*, 2 S. Dak. 480, 51 N. W. 96, that when part of a general offer was competent and other parts not, the whole should be rejected upon proper objection thereto. But where part of a witness' testimony is admissible a motion to strike it all out without discrimination should be denied: *Minneapolis etc. Ry. Co. v. Nester*, 3 N. Dak. 480, 57 N. W. 510.

record illustrates the position in which counsel are often placed by offering to prove certain facts in order to save exceptions instead of asking the questions and taking a ruling upon the questions so asked. In this case it appears that after the close of defendant's evidence the defendant was called in rebuttal. After some discussion as to whether or not the offered evidence was in rebuttal, the court, in the exercise of its discretion, allowed the plaintiff's attorney to offer it as part of his evidence in chief. The offer covers some five folios of the transcript and it is not necessary here to give it in full. Among other things, counsel for plaintiff 'offered to prove' that on the thirtieth day of June, 1890, I. S. Crawford was principal of the Petaluma High School and continued as such until the twenty-ninth day of June, 1891. That by resolution passed on the thirtieth day of June, 1890, the salary of the principal of said school was fixed at one hundred and sixty-five dollars per month. That Professor Crawford continued to teach until June 29, 1891, when his resignation was received, and, on motion, accepted. That the board then proceeded to ballot for his successor. That the names of several candidates were proposed, and, upon ballot being taken, plaintiff was elected successor to said Crawford. That plaintiff thereupon entered upon his duties as teacher and continued to teach up to the sixteenth day of February, 1895, receiving one hundred and sixty-five dollars per month during all that time. That the salary of plaintiff was paid by warrants drawn by the board of education upon the treasurer of the city of Petaluma. Counsel for plaintiff offered to prove all the above facts 'by the minutes of the board of education and other testimony.' The offer was objected to as being incompetent, irrelevant and immaterial. The objection was sustained, and plaintiff's counsel excepted. We think the ruling correct. The offer included many different propositions grouped together, and, if the proof of any one proposition was incompetent, irrelevant, or immaterial, the ruling should be sustained. It certainly does not appear to us that evidence as to one Crawford being principal of the high school in June, 1890, that he continued to teach until June, 1891, and then resigned, that the resignation was accepted, that several candidates were proposed to fill the vacancy, that the salary of the plaintiff was paid by warrants drawn on the

treasurer, would have been material or relevant to any issue before the court." It will be seen that while conceding that some of the matters covered by the offer were amenable to the general objection which was made, others were not. By specifying part of them as being inadmissible over the objection, the court concedes that others were admissible; and yet, without citing any of the prior cases declaring a different rule in such cases, and without citing any authority whatever in support of its radical departure from established law on that question, the court says, that "if the proof of any one proposition was incompetent, irrelevant or immaterial, the ruling should be sustained." The following is suggested upon authority as a correct and reasonable rule covering the whole subject: When several papers or matters are offered in evidence in and by one and the same offer "en masse," whether an objection good as to part and untenable as to part should be sustained will depend somewhat upon the form of the offer and the intention of the party making it, aside from the fact that he makes it in its entirety. In the absence of any expression or indication on the subject it will be presumed that the parts are offered *seriatim*,⁹³ in which case two courses are open to the opposite party: 1. To ask that the offer be segregated, or that the connection between the various parts be explained or made to appear preliminarily to any of it being admitted;⁹⁴ 2. To make separate objection to each and every part offered without demanding a segregation. If he fail to pursue either of these courses, and his objection be not well taken as to each and every part, it is not good as to any.⁹⁵ There is no doubt of the court's power to compel a segregation of the offer in such cases. Where counsel admitted the relevancy of part of a mass of evidence so offered, and the trial judge offered that if he would point out the portions which he deemed irrelevant, he would rule upon any objections which might be made thereto, and the offer of the court was not acted upon, it was held that there was no error in admitting the whole.⁹⁶

⁹³ See *Lick v. Diaz*, 56 Cal. 647.

⁹⁴ See *Smith v. East Branch Co.*, 54 Cal. 165.

⁹⁵ *Harris v. Zanone*, 93 Cal. 59, 71, 28 Pac. 845.

⁹⁶ *Harris v. Zanone*, 93 Cal. 59, 71, 28 Pac. 845.

§ 292. Deposition not to be segregated and read in parts.

The general rule requiring evidence to be introduced serially, and testimony by question and answer, does not apply in the case of a deposition so as to permit a party to read selected portions thereof and withhold the balance, and it is error to permit it. In *Bank of Oakland v. Finnell*,⁹⁷ the court said: "The errors complained of refer to rulings of the court in giving or refusing instructions, and in admitting or excluding evidence. Of the latter, one error specified is the ruling of the court in permitting portions of the deposition of one Mecum, a witness of the plaintiff, to be read in evidence, and in refusing to strike out the same. The reading of the deposition was prefaced with the statement of the plaintiff's attorney that he did not intend to offer the entire deposition, but part of it only, to which objection was made and overruled, and exception taken. On the completion of the reading, the defendant's attorney moved to strike out what had been read, on the ground that only part of the deposition had been read, but the court overruled the motion, the defendant excepting. It is set forth in the statement that the defendant did not offer any portion of the deposition, and that no objection was made to his doing so, and portions of the evidence omitted are also inserted. But these matters we deem immaterial. The simple question involved is, whether it is permissible for a party to introduce in evidence selected portions of the deposition of his own witness, omitting the rest, and, clearly, this question must be answered in the negative. In this state, the only authority for the use of depositions is in the provisions of the code which provide that 'the depositions' may be used; but it is not said that portions of them can be used, nor can it be inferred that such was the intention."

⁹⁷ 133 Cal. 475, 65 Pac. 976. To same effect, *Kilbourne v. Jennings*, 40 Iowa, 473; *Grant v. Pendery*, 15 Kan. 236; *Hill v. Sturgeon*, 28 Mo. 323; *State v. Rayburn*, 31 Mo. App. 385; *Lanahan v. Lawton*, 50 N. J. Eq. 276, 23 Atl. 476; *Thomas v. Miller*, 151 Pa. St. 482, 25 Atl. 127; Cal. Code Civ. Proc., §§ 2228, 2232, 2234. In *McCardle v. Bullock*, 45 Ga. 89, the court said: "If the practice of the court permits the party bringing them in (referring to the interrogatories) to read . . . only the direct answers, it is a new practice to us." The following comment on authorities is found in the principal case above (page 477): "Other cases hold that parts of a deposition

§ 293. Error cannot be predicated on form of question.

Reversible error cannot be predicated upon the fact that counsel were allowed to ask leading questions, that being a matter largely within the discretion of the court. Technically, it is error to allow counsel to lead the witnesses, but such errors are considered as of such small importance that they will be given scant consideration when assigned and relied upon as error. Where, however, they are permitted to a palpably injurious extent, they will be reviewed under the first subdivision of section 657 of the California Code of Civil Procedure, as abuse of discretion.⁹⁸

may be used in certain cases, as declarations of the party testifying (Code Civ. Proc., § 1870, subd. 1; *Van Horn v. Smith*, 59 Iowa, 142, 12 N. W. 789, distinguishing *Kilbourne v. Jennings*, 40 Iowa, 473; and see, also, *Citizens' Bank v. Rhutasel*, 67 Iowa, 319, 25 N. W. 261); or as declarations of a witness to contradict him (*Webster v. Calden*, 55 Me. 165; *Whitman v. Morey*, 63 N. H. 448, 2 Atl. 899); and others that a party may read the whole or a part of a deposition taken on behalf of his adversary (*Converse v. Meyer*, 14 Neb. 190, 15 N. W. 34; *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598; *Byers v. Orenstein*, 42 Minn. 386, 44 N. W. 129; *Watson v. Race*, 46 Mo. App. 552)—the decision being based, apparently, on the principle laid down in *Van Horn v. Smith*, 59 Iowa, 142, 12 N. W. 789.”

⁹⁸ *Moran v. Abbey*, 63 Cal. 56; *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *Smithers v. Fitch*, 82 Cal. 153, 22 Pac. 935; *White v. White*, 82 Cal. 427, 1145, 23 Pac. 276; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Clary*, 72 Cal. 59, 13 Pac. 77. The overruling of an objection to a question as leading, when, though somewhat leading, it was merely a summing up of the witness' testimony already given, is not an abuse of discretion: *Freeman v. Huron* (City of), 10 S. Dak. 368, 73 N. W. 260. In the first case cited above the court said: “Four or five specifications of error relate to rulings made by the court in denying objections by counsel for plaintiff to leading questions asked by counsel for Heffner, in the direct examination of his witnesses. But these are not errors for which a new trial will be granted. We are not aware of any case in which a verdict has been set aside for the reason that leading questions, although objected to, have been allowed to be put to a witness: *Green v. Gould*, 9 Allen, 466; *Hopkinson v. Steel*, 12 Vt. 582; *Parsons v. Huff*, 38 Me. 187; *Mershon v. Hobensack*, 22 N. J. L. 372. And the reason is that the examination of a witness in the trial of a case is a matter within the sound discretion of the trial court, who may, in the exercise of that judicial discretion, allow or disallow leading questions: Code Civ. Proc., §§ 2044-2046. A matter rest-

§ 294. Error resulting from production and nonproduction of documentary evidence.

Refusals to allow inspection of papers, where the matter is brought to the attention of the court for the purpose of obtaining a rule on the party refusing to allow an inspection of, or refusing to produce the same in court, is a proper subject for an assignment of error, by a party against whom the court rules. Whether the error be prejudicial to the extent of entitling the party to a new trial or reversal depends, of course, upon circumstances. On the trial of *Pope v. Dalton*,⁹⁹ the plaintiff had put in evidence certain deeds, through which he claimed to have deraigned title to the demanded premises. Afterward, in the progress of the trial, the defendant's attorney, whilst engaged in the cross-examination of a witness for the plaintiff, desired to inspect the deeds already in evidence, but which were in the custody of the plaintiff's attorney, and who refused to submit them to the inspection of the defendant's attorney, on the ground that they were the private papers of the plaintiff, and on the further ground, as he alleged that on that morning the defendant's attorney had inspected the deeds at the office of the plaintiff's attorney. On this refusal the defendant's attorney moved the court to compel the plaintiff's attorney to produce the deeds for inspection, and, on his refusal to produce them, to strike them out as evidence. The motion was denied, and the defendant, having excepted, assigned this ruling as error. The supreme court held the exception well taken, saying: "No brief has been filed on behalf of the respondent, and we are, therefore, furnished with neither argument nor authority in support of what we cannot but deem an extraordinary ruling. To deny counsel, in the progress of a trial, a full opportunity to inspect documentary evidence offered by his adversary is an error too patent to require discussion. Nor can we infer that no damage resulted to the defendant from this ruling. On the contrary, there may have been the most satisfactory reasons why it was important to the

ing in judicial discretion is not reviewable in an appellate court; it is only the abuse of such discretion of which we will take cognizance. In this case no such question is presented by the record."

⁹⁹ 40 Cal. 638.

defense to have an inspection of the deeds.” In another case,¹⁰⁰ a like refusal was held to be reversible error, although the papers of which an inspection was desired had not been put in evidence. At the trial, the prosecution produced certain papers which were found in the street, the contents of which it was claimed tended to inculcate the defendant, and called a witness to identify the papers and to prove the circumstances under which they were found. The papers were handed to the witness, who identified them as the same which were found in the street, but they were not then read to the jury, or offered in evidence. When the counsel for the defendant came to cross-examine the witness, he demanded an inspection of the papers, alleging that he could not properly conduct the cross-examination unless he had an opportunity to inspect them. But the court refused to compel the prosecution to produce the papers for inspection, and thereupon the counsel for the defendant declined to cross-examine the witness. Subsequently, experts were called by the prosecution to prove by a comparison of hand-writings that the papers were written by the defendant, and their evidence tended to prove that fact. It appeared from the bill of exceptions, in the published report of the case, that the papers “were not read to the jury, nor was defendant’s attorney allowed an inspection of them, until the district attorney opened his argument to the jury, after the case had closed.” In reversing the case and directing a new trial, the supreme court said: “The refusal of the court to compel the prosecution to produce the papers for the inspection of counsel was duly excepted to, and this ruling is relied upon as error. It is too plain to merit discussion that, under the circumstances stated, the defendant was entitled to inspect the papers—if not for the purpose of cross-examining the witness, certainly before the close of the testimony. By the practice pursued by the court, the defendant was deprived of the opportunity to offer any evidence he may have had in rebuttal or explanation of the papers, or even to disprove their authenticity. Such a practice is subversive of the ends of justice, and ought not to be tolerated.”

¹⁰⁰ *People v. Stevens*, 52 Cal. 458.

§ 295. Error in case of joint parties in admission or rejection of evidence, admissible as to one party, but inadmissible as to another.

If, in an action brought against two defendants, jointly, evidence is offered which is admissible as against one but inadmissible as against the other, a general objection to the testimony is insufficient. The objection must point out why the testimony ought not be received.¹⁰¹

§ 296. Repeating objection—When not necessary.

When the same evidence has been already objected to and ruled out by the court, there is no need to repeat the objection on repetitions of the question. The court may properly treat the objection as continuing on every repetition of the question, unless, something transpires to show that it is waived.¹⁰² And where in such case, instead of excluding the evidence, the question is permitted, but not answered and an exception taken, the party excepting is entitled to his exception, upon a repetition of substantially the same question and an answer thereto, whether or not he expressly renews the exception. Nor will a slight change in the phraseology of the question operate to deprive him of the benefit of his exception.¹⁰³

¹⁰¹ *Voorman v. Voight*, 46 Cal. 392, 398. In this case the court said: "We are of the opinion that the exception taken to the evidence of Schultz and Voorman cannot be maintained. The objections were general against their admissibility for any purpose whatever. It is clear enough that had Voight been the sole defendant in the action, the evidence objected to would have been admissible as against him. If, as to his codefendant Spreckels, a different rule would obtain, by reason of the latter being a guarantor only (a question not necessary to consider), the objection should have been limited accordingly, or an instruction asked upon the point."

¹⁰² *People v. Melvane*, 39 Cal. 614, 619.

¹⁰³ *Magee v. North Pac. Coast R. R. Co.*, 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114. In this case the court said: "On the trial, while the plaintiff was testifying as a witness in his own behalf, he was asked by his counsel, 'Did you ever know of any defect in the fence?' Defendant's counsel objected to the question 'as incompetent and inadmissible under the pleadings,' it being 'nowhere alleged in the complaint that there was any defect in the structure of the fence that was unknown to plaintiff.' The objection was

And, while if substantially the same question be repeated though in somewhat different terms, the objection need not be renewed, yet any variance in the substance of the question will necessitate a renewal of the objection, else it will be treated as waived. Thus, where, in a prosecution for libel, the objection to the first question was as to the understanding of the witness of the language alleged to be libelous, in relation to the person libeled, had been overruled, and the next question was as to the understanding of the witness without reference to any particular persons, and was answered without objections, it was held that the objection to the first question did not hold good as to the second.¹⁰⁴

The rule which gives force and effect to an objection and exception once made and taken as against a repetition of the same line or character of examination without a repetition, is not limited in its application to questions subsequently propounded to the same witness; and where testimony of a witness for plaintiff had been erroneously admitted against the objection of defendant's counsel, who had excepted, it was held that defendant did not waive its objection by failing to object and except to questions asked plaintiff which called for evidence to the same point, the court saying: "The suggestion that the objection cannot be entertained because the plaintiff Salona was subsequently permitted, without objection, to testify to substantially the same matter as that stated by the witness Hayes, is without weight. Where a party has once formally taken exceptions to a certain line or character of evidence, he is not required to renew the objection at each recurrence thereafter of the objectionable matter arising in the examination of other witnesses; and his

overruled, and before the witness answered the question, counsel for plaintiff put the question in the following form: 'If there were any defects in the fence along the right of way, were any such defects known to you up to the seventeenth day of April, 1882—that is, the time when this suit was commenced?' The witness answered, 'No, sir.' Counsel.—'There were none?' Witness.—'There were none.' It does not appear that counsel for defendant renewed his objection to the question as it was finally put and answered, but we think he should, nevertheless, have the benefit of his objection and exception, as the change in the form of the question was one of phraseology only."

¹⁰⁴ People v. Miller, 122 Cal. 84, 93, 54 Pac. 523.

silence will not debar him from having the exception reviewed."¹⁰⁵ But since all rules governing objections have for their object the information of the judge as to what he is to rule upon, the fact that an objection subsequent to one technically specific is less broad than the one preceding it will not render it insufficient if it perform the office of thus giving the requisite information. Thus in *People v. Mullins*,¹⁰⁶ the attorney general made the point on appeal that the defendant's attorney did not sufficiently object, on the ground of privilege, to the questions asked defendant on the witness-stand about communications with his wife. The first question was, "What did you say to your wife when you went home that night?" The counsel for defendant objected in these words: "We object to any conversation between him and his wife, as not in cross-examination, and as improper, being a privileged communication." The court overruled the objection and the defendant excepted. To subsequent questions the objections were on the ground of incompetency, without a specification concerning the privilege. The court held that the word "incompetent" was sufficiently broad under the circumstances. Under the decisions it will be observed that there was not any necessity for a renewal of the objection in any form in order to obtain the benefit of an exception.

¹⁰⁵ *Green v. Southern Pac. Co.*, 122 Cal. 563, 565, 55 Pac. 577. To same effect is *People v. Castro*, 125 Cal. 521, 58 Pac. 133, holding that sufficient objection to confession to one person hold good without renewal, where confessions to other persons open to the same objection were offered in evidence and admitted. In this case the following appears in the opinion of the supreme court: "It is claimed that the court erred in overruling defendant's objection to the question: 'Q. What did you understand by the language of the paper in relation to Judge Reynolds and Attorney Wright?' The court overruled the objection and defendant excepted. The district attorney thereupon reframed his question, the answer to which was on motion of defendant's attorney stricken out. The record then shows: 'Mr. Beasley (District Attorney).—Don't state to whom you understood it to refer, but state what you understood by it in reference to any person. A. You are trying to get the word "crookedness"—what it means? Q. Yes, that is what I am trying to get at.' The witness then gave what he understood by the word 'crookedness.' Defendant made no objection to the question or answer, and we think cannot now be heard to object.'"

¹⁰⁶ 83 Cal. 138, 144, 17 Am. St. Rep. 223, 23 Pac. 229.

If, upon sufficient objection to a question, the court, without ruling upon it, suggests to the attorney examining the witness a question which he may ask the witness, and the question suggested is likewise within the objection, the objector is not bound to renew the objection to the suggested question, when asked. Thus in *Sharon v. Sharon*,¹⁰⁷ the court said: "Counsel for respondent contend that the question following the statement of the court as to what the plaintiff might ask were not objected to, and therefore no question is presented for our consideration. The first question which was improper was objected to. The court then stated, in reply to the objection, just what the plaintiff might ask, to which the defendant excepted, and the improper questions, authorized by the court in advance, were asked and answered. It was not necessary for the defendant to renew his objections to the questions as they were asked, so long as they were within the direction of the court as to the extent to which the examination might go."

§ 297. Error in striking out and refusing to strike out evidence.

A motion to strike out evidence already admitted raises a question for the court's ruling of exactly the same character, and it is governed by the same rules as to form and sufficiency as an objection to proffered evidence. A party is sometimes entitled as of right to have such motion entertained by the court. And it is the duty of the court to entertain such motion, where the circumstances are such that if his motion were not entertained and ruled upon he would be deprived of any ruling whatever upon the admissibility of the evidence.¹⁰⁸ But in

¹⁰⁷ 79 Cal. 633, 674, 22 Pac. 26-131.

¹⁰⁸ *Barkley v. Copeland*, 86 Cal. 483, 25 Pac. 1. See, also, *Kiler v. Kimbal*, 10 Cal. 267, where testimony to prove mining rules was introduced and it subsequently appeared that they were in writing. Where an answer of a witness is not responsive to the question, and an objection thereto is sustained, but the answer is not stricken out or withdrawn from the jury, an assignment of error with reference thereto will not be considered: *Anderson v. Jordan*, 15 S. Dak. 395, 89 N. W. 1015; *Kneeland v. Great Western El. Co.*, 7 N. Dak. 454, 75 N. W. 907. But where a witness testifies to facts as of his own knowledge, and on cross-examination it appears that the sources of his knowledge are meager, his testimony should not be stricken out.

cases where the party does not apply as of right to have evidence stricken out, the court has an almost unlimited discretion as to whether or not the motion will be entertained. Of course the question of entertaining the motion and that of ruling upon it are distinct, the one being determined by an exercise of discretion, and hence seldom subject to review, the other subject to exception and review as other rulings during the trial. Notwithstanding such liberal discretion, the indiscriminating practice of admitting evidence which might have been objected to and its admissibility ruled upon at the time it is offered is a departure from the orderly course of procedure. The supreme court of California has severely condemned the practice; and has gone so far as to say that the practice was not to be tolerated.¹⁰⁹ On

Its value is for the jury: *Farmers' Bank v. Saling*, 33 Or. 394, 54 Pac. 190. And it was held in a case of the insufficiency of the evidence for plaintiff, where the claims of plaintiff and defendant to the same property were adverse, and the evidence was conflicting, the proper practice was not to move to strike out the evidence but for a direction for a verdict for defendant: *Murray v. Montana L. Co.*, 25 Mont. 14, 63 Pac. 719. After some foundation has been laid, though slight, and material evidence admitted thereon the court should not strike out the evidence on motion before the close of the case, as the foundation may be strengthened by other evidence: *Withers v. Kemper*, 25 Mont. 432, 65 Pac. 422.

¹⁰⁹ *People v. Long*, 43 Cal. 444, 446; *People v. Rolfe*, 61 Cal. 540, 542. The question of censurable practice as distinct from waiver is aptly illustrated in the second case above, where the court said: "It is claimed that the court erred in denying defendant's motion to strike out the evidence of the witnesses Collins, Fields and others. It is a sufficient answer to this point that all of the evidence which the court refused to strike out came in without objection or exception; and this court has several times held that in such a case a motion to strike out should not be allowed. The rule has been laid down in both civil and criminal cases. *Goodale v. West*, 5 Cal. 339, is an early civil case to that effect, and *People v. Long*, 43 Cal. 444, is a late criminal case announcing the same rule. Wallace, C. J., there says: 'The practice, whether in civil or criminal cases, of deliberately permitting evidence to be given without objection in the first instance, and then moving to strike it out on the grounds which might readily have been availed of to exclude it when offered, is not to be tolerated.' A party is not permitted to remain silent when evidence is offered, with the privilege of accepting it if favorable and afterward moving to strike it out if it is against him, but he must exercise his right of objection at a proper and reasonable time."

the other hand, the supreme court has frequently recommended the exercise of the discretion within proper limits for the promotion of substantial justice; and in *People v. Wallace*,¹¹⁰ reversed the judgment because of the court's refusal to strike out hearsay evidence although admitted without objection. The court was constrained to reverse the case on this and on the additional ground of the embarrassing position in which the misconduct of the prosecuting attorney and an irrepressible juror had placed the defendant, whereby he could not renew his objections except at the risk of prejudicing the jury against his side. After a review of authorities from other states the court said: "We think the court should have excluded this incompetent evidence upon defendant's motion. The court ought to have done so, not only because of the nature of the evidence, but because the defendant had more than once objected to its introduction, when the counsel conducting the case for the people was endeavoring by repeated questions to get it before the jury, in open defiance of the rulings of the court, and the objection to it was only yielded in deference to what seemed to be the wish of a juror to hear the evidence. But the court ought not to have permitted the defendant to be placed in this position, and should have enforced its previous rulings on its own motion. But whether it did this or not, the testimony should have been excluded, upon the subsequent motion of the defendant."

It is not only always the proper province but often the duty of the court to strike out illegal evidence or to direct the jury to disregard it, whether objected to when admitted or not. In *Parker v. Smith*¹¹¹ the court said: "On the trial of this cause one of the witnesses deposed to a state of facts which upon his cross-examination proved to be hearsay evidence, and wholly inadmissible, whereupon the court ordered the testimony of the witness to be stricken out, and instructed the jury to disregard it. The appellant assigns this as error: 1. Because the testimony was not objected to in limine by the respondent; and 2. Because the court of its own motion ruled it out. . . . The right of the court to interfere is also undoubted. The testimony was clearly improper. The duty of the court was not

¹¹⁰ 89 Cal. 158, 167, 26 Pac. 650.

¹¹¹ 4 Cal. 105.

confined to passing upon such portions of the testimony as may be objected to, but extends to the preservation of the rights of litigants, and a proper disposition of the matters in controversy." And in *Monford v. Rowland*¹¹² the court declared the same policy as follows: "The court is not bound to accept anything but legal evidence, and should seldom, if ever, allow its judgment to be controlled by anything else. The parties are at liberty to make such agreements respecting the evidence as they may see fit, but the court is not bound by them. The court may recognize them if it thinks proper to do so, but it should in no case sanction them if they are against the policy of the law, or dangerous to the safe administration of the law."

§ 298. Same subject—Rules and illustrations.

Leaving out of account for the present the exercise of the court's discretion which may have the effect of suspending all ordinary rules herein, the following are stated upon authority, as reasonable and conducive to justice: When it is apparent from the question that the answer will contain evidence necessarily inadmissible, then a motion to strike out comes too late, unless preceded by an objection to the question; but the rule is otherwise when the evidence may or may not be admissible.¹¹³

¹¹² 38 N. J. Eq. 185.

¹¹³ *People v. Williams*, 127 Cal. 216, 59 Pac. 581. The facts, and view of the court thereon, in this case as stated in the opinion afford an excellent illustration of the rule stated in the text. The court said: "A witness was interrogated as to a certain conversation he had with the codefendant, Azhderian, prior to the alleged extortion. He testified that in answer to the question, 'What are you building the house out there for?' the codefendant, Azhderian, in substance, stated: 'The ladies [meaning the defendant and another woman] are dead fly, and I am building this house so that when we leave the Paragon (Nevilles' farm) we can go there. Then I will bring business men out there and we will get them full of wine and afterward blackmail them.' A motion to strike out this statement of the witness was denied. The statement should have been stricken out. It has nothing whatever to do with the merits of this prosecution. It was greatly prejudicial to the defendant, for it was well calculated to make the jury look upon her with unkindly eyes. A contemplated scheme by these two defendants to blackmail or extort money from other persons was no more admissible at this trial than the evidence of previous robberies or arsons

An irresponsive answer can only be reached by a motion to strike it out;¹¹⁴ and the only way to reach part of a nonresponsive answer to a proper question is by motion to strike out the nonresponsive portion of the answer.¹¹⁵ The only way to reach an irresponsive statement of a witness, made without a question being asked, or after having answered a proper question is by motion to strike it out, and error cannot be predicated upon a ruling upon an objection interposed to it.¹¹⁶ A motion to strike out testimony responsive to an improper question not objected to is properly denied.¹¹⁷ And for even better

would have been admissible if defendants had been upon trial for robbery or arson. It is now urged that the motion to strike out was properly denied as coming too late, no objection having been first made to the question. This position cannot be sustained. No objection perceptible to this court could have been well made. It was not until the answer came that it could be ascertained that the evidence should not go to the jury. And then the only remedy was the motion to strike out. Many statements made by the codefendant would have been clearly admissible. And the admissibility of this evidence could not be determined until it was first ascertained what it was. When it is apparent from the question that the answer will contain evidence necessarily inadmissible, then a motion to strike out comes too late unless preceded by an objection to the question, but the rule is otherwise when the evidence may or may not be admissible.”

114 *People v. Swist*, 136 Cal. 520, 69 Pac. 223.

115 *O’Callaghan v. Bode*, 84 Cal. 489, 496, 24 Pac. 269.

116 *Tate v. Fratt*, 112 Cal. 613, 619, 44 Pac. 1061.

117 *People v. Harlan*, 133 Cal. 16, 65 Pac. 9. In this case the following facts shown by the record and view of the court are found in the opinion: “Etonia Diaz testified as follows: ‘Reta Martin is my niece. Her mother is my sister. I think I know Reta’s age. Q. What is it? A. I think it is fifteen.’ Defendant’s counsel here moved ‘to strike out the answer, as not responsive to the question.’ No objection was made to the question, and the answer was responsive to the question; the motion was properly denied. Immediately after the disposition of this motion, the witness stated: ‘She was fifteen in last January. I know that from letters her mother sent me. . . . After Reta was born I received letters from her mother every three months. I did not keep them, and I am most sure that Reta’s age is fifteen years. I remember Reta is fifteen years, from those letters and other things.’ No objection was interposed during the giving of the above evidence, but at its conclusion counsel for the defendant said: ‘I move to strike out all the testimony of this

reasons a party cannot have testimony stricken out which was responsive to questions propounded to a witness by himself.¹¹⁸

Where a witness answers a question notwithstanding that an objection thereto is sustained by the court, the objecting party should ask to have the answer stricken out; and, failing to do so, waives his objection.¹¹⁹

Where evidence is offered which without other evidence would be inadmissible, and is admitted by the court with or without objection, upon the promise of the party offering it, to offer the necessary additional evidence which he fails to do, the other party may move to strike out the evidence so admitted; and, if the evidence be of a character calculated to prejudice him, it is error to deny the motion.¹²⁰

witness in regard to the age of Reta Martin, on the ground that there is no positive evidence in regard to it.' But there was positive testimony that the witness had received letters from Reta's mother, and that she knew Reta's age from those letters. An objection that evidence is not positive goes to its weight, rather than to its admissibility. It may be that the evidence should have been excluded on the ground that it was based upon hearsay or was not the best evidence, but neither this court nor the court below is required to pass upon objections that are not made.'"

118 *Byrne v. Reed*, 75 Cal. 277, 17 Pac. 201; *People v. McNamara*, 94 Cal. 509, 29 Pac. 953. In the first of these cases the following appears in the opinion: "The defendant Reed was called up as a witness by the plaintiff, and was asked how she paid for the property conveyed to her. She answered that when she purchased the property her aunt (defendant Hill) owed her \$1,976.33, and added: 'The consideration of the indebtedness was this; my mother gave my aunt five hundred dollars for me September 10, 1868.' She was then asked how she knew her mother gave five hundred dollars to her aunt, and she answered that her aunt told her so. Counsel for plaintiff moved to strike out the answer, and the court denied her motion. We see no error in this ruling. The answer was responsive to the question, and the fact that it was hearsay was no reason for striking it out.'"

119 *People v. Putnam*, 129 Cal. 258, 262, 61 Pac. 961.

120 *People v. Powell*, 87 Cal. 348, 363, 25 Pac. 481. In this case the court said: "There was evidence admitted in behalf of the prosecution, of conversations between the witness Mrs. Willis and third parties, not in the presence of the defendant, and with which he was in no way connected. This evidence should have been excluded. It was admitted by the court below upon the assurance

Where facts are disclosed upon cross-examination of a witness showing the incompetency of his testimony in chief, it should be stricken out on motion, and it is error for the court to deny a motion to strike out such testimony.¹²¹

§ 299. Motion must be specific.

The same rule here holds good with regard to the duty of the party making the motion to specify the grounds thereof

of counsel for the prosecution that it would be brought home to the defendant, which was not done. The same may be said of the testimony of the witness Glennon, of conversations between Mrs. Willis and himself. The prosecution having failed to connect the defendant with the subject matter of the conversation the defendant moved to strike out the evidence. The motion was denied. This was error. The evidence should have been stricken out."

¹²¹ Crary v. Campbell, 24 Cal. 634. The facts and the view of the court thereupon clearly appear from the part of the opinion reading as follows: "On the trial the plaintiff examined a witness who gave evidence to show that this mining claim was located by certain persons whom he named, before the ditch was constructed. The witness testified that he purchased the claim of those who first located it, and took possession of it in the fall of 1854, and continued to hold it until he conveyed the same to the plaintiff and others, and that from that time the plaintiff had held it in possession. On his cross-examination the witness testified that, when he purchased he received a bill of sale of the claim from his vendors, and that when he conveyed to the plaintiff and others, he executed to them a bill of sale of the property. These facts appearing, the counsel for the defendants moved the court to strike out the testimony of the witness as to his purchase, and also as to his sale and conveyance to plaintiff and others, on the ground that the transfers of the property were in writing, which was the best evidence thereof. The court denied the motion, and the defendant's counsel excepted. This ruling of the court the appellants assign as erroneous. If the facts sought to be proved by this witness were material, as they seem to have been regarded by the parties and the court, then the bills of sale, which were the best evidence of the transfers, should have been produced. The plaintiff deemed it necessary to connect himself with the right and title acquired by the original locators of the mining claim, and we apprehend it was of some importance, at least that he should do so. But, to do this, it was necessary for him to produce the conveyances or bills of sale, the existence of which was proved. The court ought to have ordered the parol evidence of the sales and conveyances stricken out, when the application to that end was made."

as where objection is made to the evidence in the first instance, in so far as it is applicable. There are few exceptions to the rule that the grounds of the motion should be specified. In *Hill v. Reese*¹²² the following appears in the opinion: "The next error assigned is the refusal of the district court to strike out the answer of the witness Rose, to the question found at folio 212 of the transcript. The answer was responsive to the question, and counsel did not specify the points on which they rested the motion. In such cases the moving party should specify his objection to the answer, with the like particularity as is required in pointing out an objection to a question. The same reasons render this proper." The motion is likewise treated as is an objection in the respect that when directed against a mass of evidence in which some parts are admissible, but other parts inadmissible, it should be directed with such precision to the part attacked that no uncertainty may remain as to the testimony challenged; and if not so directed there is no error in denying the motion.¹²³ Accordingly, a motion to strike out the evidence of a witness as to the declarations of a co-conspirator, which covered competent evidence of such declarations was held too broad, and to have been properly overruled.¹²⁴ In *Hellman v. McWilliams*,¹²⁵ the court said: "The motion to strike out all of witness Hellman's testimony, 'so far as it states the effect of what took place between himself and Eli W. Hawkins, except the naked statement of what was said and done,' was so general and indefinite that we do not see how the court below could have determined precisely what portion of the testimony was intended, and had the motion been granted, we should be at a loss to know what was stricken out. Where testimony is admitted some of which is relevant and competent, and intermingled with that which is improper, a motion to strike out should be directed with such precision to the portion attacked that no uncertainty may remain as to the testimony challenged."

¹²² 47 Cal. 294, 341; *Henry v. Southern Pac. R. R. Co.*, 50 Cal. 176, 181; *People v. Eckman*, 72 Cal. 582, 583, 14 Pac. 359.

¹²³ *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659; *Chester v. Bower*, 55 Cal. 46.

¹²⁴ *People v. Rodley*, 131 Cal. 240, 63 Pac. 351.

¹²⁵ 70 Cal. 449, 453, 11 Pac. 659.

§ 300. Exceptions, form of and when to be taken.

No review can be had of a ruling upon an offer of evidence, objected to, whether it be admitted or excluded, nor upon a motion to strike out evidence, unless the ruling be excepted to.¹²⁶ Wherever in statutes, a review of decisions of courts is provided for, such review is limited to errors which have been excepted to, and usually it is provided that no particular form of exception is required, which is true in the absence of statutory provisions. Section 646 of the Code of Civil Procedure of California defines an exception as follows: "An exception is an objection upon a matter of law to a decision made either before or after judgment, by a court, tribunal judge, or other judicial officer, in an action or proceeding. The exception must be taken at the time the decision is made, except as provided in section 647." Section 647, specifies certain matters, orders and decisions which are deemed to be excepted to without any exception being actually taken.

As the error to be excepted to consists in the ruling or decision, and the exception must be taken "at the time the decision is made," it is obvious that it can only be taken after it is made, and immediately following the decision.

An absent party will not be deemed to except to a ruling, except the ruling came within the terms of the statute allowing an exception in favor of absent parties in certain cases.¹²⁷

Of course the same rule, with respect to saving exceptions applies where the ruling is on a motion to strike out evidence. Thus where a witness answered a question before the party against whom the witness gave testimony had opportunity to object, and upon the latter's request the court struck out the answer for the purpose of allowing him to object, but before he had stated his objection the counsel examining the witness proceeded with his examination, and propounded another question, without excepting, it was held that he thereby waived

¹²⁶ *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955. See, also, *McCartney v. Fitzhenry*, 16 Cal. 184; *Turner v. Tuolumne etc. Co.*, 25 Cal. 397; *Keeran v. Griffith*, 34 Cal. 580; *Russell v. Dennison*, 45 Cal. 338.

¹²⁷ *McGuire v. Drew*, 83 Cal. 225, 23 Pac. 312.

any error that might have been committed by the court in striking out the answer.¹²⁸

§ 301. Waiver and cure of error herein.

So many matters are proper for the consideration of the lower court on motion for new trial, with reference to the effect of error in ruling on admissibility of evidence, and upon motions to strike out evidence which the appellate courts will not review, and so much is conceded to the discretion and judgment of the lower court, especially where the order on motion for new trial is brought up for review, that is thought best to defer further discussion as to waiver of error, cure of error, and of questions as to the effect of error, as being harmless or prejudicial, to that part of this work where the scope of and limitations upon review in the appellate court are discussed.¹²⁹ It is not to be understood, however, that different rules of decision govern in the two jurisdictions, in the one on motion for new trial, and in the other on appeal. If that were the case a postponement would not be justified. Theoretically at least the rules are the same, and should be similarly applied.

¹²⁸ *Barkly v. Copeland*, 86 Cal. 483, 486, 25 Pac. 1.

¹²⁹ *Post*, chapter 40.

CHAPTER 16.

ERRORS IN GIVING, REFUSING AND MODIFYING INSTRUCTIONS.

- § 302. Scope of and limitations upon discussion.
- § 303. Constitutional limitation upon common-law power of courts.
- § 304. No error of omission in the absence of a request.
- § 305. Duty of court to instruct upon proper request.
- § 306. Same subject, exception to rule.
- § 307. Respective duties of counsel and court, in preparing and passing upon instructions.
- § 308. No reviewable error in instructions in equity case.
- § 309. The court must not submit questions of law to the jury.
- § 310. Code provisions.
- § 311. Preliminary to succeeding sections.
- § 312. The court must not charge the jury with respect to matters of fact, the existence or nonexistence of which are questions to be passed upon by the jury.
- § 313. The court must not assume the truth of any disputed issue upon which the jury are to pass.
- § 314. Same rule—Assumption of no consequence where apparently not prejudicial.
- § 315. The court must not express an opinion as to what the evidence proves.
- § 316. The court must not, in its charge, exhibit partiality for either side, or intimate how the jury should decide.
- § 317. The court must not give argumentative instructions.
- § 318. The court must not charge as to any presumptions of fact.
- § 319. The court must not charge as to the credibility of witnesses, or draw invidious comparisons between direct and circumstantial evidence.
- § 320. The court must not give ambiguous or uncertain instructions.
- § 321. The court should not declare abstract principles of law to the jury.
- § 322. The court must not give erroneous instructions.
- § 323. Same test applied to modified as to other instructions.

§ 324. The court must not give contradictory or inconsistent instructions.

§ 325. Construction of instructions.

§ 326. Exemptions and harmless invasions.

§ 327. The court may state the evidence, and state that there is evidence tending to prove certain facts.

§ 328. The court may state that a fact is proven, or admitted, as to which there is an admission, or evidence without conflict, may state that a fact is not proven, in the absence of evidence, and may inform the jury that there is a conflict, when such is the case.

§ 329. The court may direct a verdict in certain cases.

§ 330. No review without exception taken.

§ 331. Cure and waiver of error, and question of whether harmless or prejudicial.

§ 302. Scope of and limitation upon discussion.

It is the present purpose to develop the subject of instructions to the fullest possible extent within the space allotted to the subject, with an eye solely to the greatest usefulness to the practitioner. Courts are so liable to err in charging in matters of law, and to invade by inadvertence and otherwise the province of juries, and are found doing so so frequently, in various ways that no full enumeration, or complete consideration in detail is practicable. But since each of the many instances of invasion and contravention falls within a separate class or category, it is practicable to deduce several rules of negation on the subject.

§ 303. Constitutional limitation upon common-law power of courts.

Under the common law there were but slight restraints upon the judges as to charging juries, and the true province of the jury as now understood, was frequently invaded, sometimes in a manner and to an extent which resulted in serious prejudice to parties and a miscarriage of justice. In the early history of the constitutional system, which is the most conspicuous feature of all republican governments, limitations were fixed, and prohibitions declared, either in the organic law, or by statutes previously sanctioned by organic law, the purpose and effect of which were to preserve to juries the full exercise of all the

functions, which at the origin of trial by jury it was intended they should possess and exercise. The provision in the constitution of California reads thus; "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."¹ At common law the judges are not thus restricted but are allowed to charge with respect to facts, and to express their opinions as to the weight of evidence. They may direct the attention of the jury to the facts and circumstances which are deemed by them to be of controlling weight, and warn them against false lights. In the earlier judicial history of California lawyers and judges were inclined to doubt the wisdom of withdrawing this common-law power from the judges. Thus in *People v. Taylor*,² Sanderson, J., said: "Which is the wiser rule is not for us to say; but it admits of serious doubt whether the cause of justice has been promoted by the adoption of the rule by which the courts of this state are governed. There could have been no object for the change except to afford to life and liberty further protection against judicial dishonesty and tyranny. Such a movement would have found fitting occasion when Henry VIII, divorced his wives and kindled the fires of the auto de fe, or when Jeffreys advised and judicially enforced the despotic and sanguinary measures of James II; but, in this day and place, the ermine is not the gift of tyrants, but of the people, whose will is subserved by an honest—not corrupt—exercise of its functions; and to deprive the jury of the aid and experience of the judge in sifting and weighing the testimony may be of doubtful wisdom."

It should, perhaps, be observed that the presence of such provision in a state constitution greatly increases the difficulty of avoiding error in giving instructions and complicates to a great degree the law governing instructions. Under the common-law system the only important tests of the propriety of an instruction were these: (1) Whether as a legal proposition it was correct; and (2) Whether it was applicable to the facts of the case. Under such a constitutional provision as the foregoing, an instruction may be entirely correct as a declaration of law, an entirely pertinent and correct comment, upon or

¹ Cal. Const., art. 6, § 19. The constitution prior to 1879, section 17 of article 6, contained this provision.

² 36 Cal. 266.

résumé of the facts, and still where given to the jury, amount to reversible error. A clear statement of the true meaning of this provision was given by Cope, J., in *People v. Ybara*,³ as follows: "It is unnecessary to inquire whether the instruction in this case was in violation of the principles of the common-law; it is clearly within the prohibition of the constitution, and cannot be maintained without disregarding the express provisions of that instrument. The language of the constitution is, that 'judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.' This provision is violated whenever a judge so instructs as to force the jury to a particular conclusion upon the whole or any part of the case, or to take away their conclusive right to weigh the evidence and determine the facts. The meaning of the provision is that the judge shall decide upon the law, and the jury upon the facts, and that the former shall not invade the province nor usurp the powers of the latter. The judge has no more right to control the opinion of the jury upon a matter of fact, than the jury have to disregard the directions of the judge upon a matter of law."

An instruction, though in the form of a legal proposition, may be, in effect, on the evidence and therefore amenable to the constitutional objection for that reason, when considered with reference to the evidence. This is illustrated in the following excerpt from the opinion in *Scott v. Wood*,⁴ with ref-

³ 17 Cal. 166, 171. See, also, *Miller v. Stewart*, 24 Cal. 502; *Battersly v. Abbott*, 9 Cal. 565; *McNeil v. Barney*, 51 Cal. 603; *People v. Cline*, 83 Cal. 374, 23 Pac. 391; *Scott v. Wood*, 81 Cal. 398, 405, 22 Pac. 871. In *McNeil v. Barney*, *supra*, the court said: "We think the instruction, which is the subject of the nineteenth exception, erroneous; it is as follows: 'If you should find that the defendant was at this time under contract with Meyerstein & Co., to haul a certain amount of freight, for instance, fifty tons a month for the period of one year, that fact will go far toward clearing up any suspicion attaching to testimony going to prove a contract, without other apparent reasons.' This instruction was not upon a question of law, but upon the matter of fact involved, and the weight of the evidence, which should be left to the determination of the jury."

⁴ 81 Cal. 398, 404, 22 Pac. 871. See, also, Cal. Code Civ. Proc., § 1963, subd. 32; *Stone v. Geyser G. M. Co.*, 52 Cal. 318; *People v. Walden*, 51 Cal. 589. In *Coghill v. Baring*, 15 Cal. 219, the court

erence to an instruction pertaining to a presumption in regard to a party's insolvency, the court saying: "The court instructed the jury that 'when a fact is once shown to exist, the law presumes it to continue until the contrary is shown.' This was excepted to and was specified as error. We think that it was error. There is no such presumption regardless of the nature of the fact. Suppose that a man was shown to be living at a certain time; would it be presumed that he continued to live a hundred years? Or suppose that a man was shown to be insolvent at a particular time: would it be presumed that the insolvency continued through several years? The true rule, and the one established by the code, is, that the presumption is that 'a thing once proved to exist continues as long as is usual with things of that nature.' In view of the evidence, the effect of the instruction was, that the court told the jury that they must find that the rate of wages continued through several years at \$250 per month, unless there was evidence to the contrary. But we do not think that the employment of a salesman at \$250 per month is a thing of such a nature that the court can say, as a matter of law, that it continued for several years unless the contrary was proved. The continuance of the employment at the rate mentioned might be inferred as a fact by the jury under the circumstances. But under our system the court is allowed to instruct the jury as to what inference of fact they are to draw."

§ 304. No error of omission in the absence of a request.

There is one notable feature of the system founded on the constitutional provision which may be here properly pointed out. There is no such thing under it as an error of omission to instruct the jury, in the absence of a proper request. The mere failure of the judge to charge the jury is not error, unless he be formally requested to do so.⁵ In *People v. McLean*⁶

said: "It does not follow because a man is insolvent one day that he was insolvent at any subsequent or antecedent period."

⁵ *Williams v. Hartford Ins. Co.*, 54 Cal. 442, 449, 35 Am. Rep. 77; *Chamberlain v. Vance*, 51 Cal. 84; *People v. McLean*, 84 Cal. 482, 24 Pac. 32; *People v. Ah Wee*, 48 Cal. 237; *People v. Collins*, 48 Cal. 277; *People v. Haun*, 44 Cal. 96; Mont. Code Civ. Proc., § 1080, subd. 7; *Helena etc. S. & R. Co. v. Lynch*, 25 Mont. 497, 65 Pac. 919; *Dell Rapids Mer. Co. v. Dell Rapids (City of)*, 11 S. Dak. 116, 74 Am. St.

the court said: "The failure of a court to charge on any point usually proceeds from inadvertence, and the law casts upon the parties the duty of calling the judge's attention to the matter by a formal request for an instruction in relation to it." And the rule applies to cases where a party upon request is entitled to have the jury confined or to have evidence, which has been admitted generally, limited to a particular purpose. In *Williams v. Hartford Ins. Co.*⁷ the court said: "But it is the established rule in this state that when testimony offered is admissible for one purpose, but is incompetent for another, it is the duty of the objecting party to ask an instruction limiting the evidence to the purpose for which it is competent, and if he fails to do so he cannot afterward complain." So in *Lownsdale v. Gray's Harbor Boom Co.*⁸ the court said: "The appellant also complains of the failure of the court to inform the jury that the boom company had a right, under its articles and by filing its map and plat of location, to the use of the river and slough within the lines of mean high tide on either side. It does not appear, however, that the court was specifically requested to so charge, and in the absence of such request, the mere failure to instruct was not erroneous."

Refusal of an instruction partly erroneous, or which cannot be properly given without qualification, is not error.⁹ And it

Rep. 783, 75 N. W. 898; *Lownsdale v. Gray's Harbor Boom Co.*, 21 Wash. 542, 58 Pac. 663. The South Dakota statute (South Dakota Comp. Laws, § 5048) required the court to write on the margin of all requested instructions the word given or refused. Where the court without the consent of counsel requesting certain instructions materially changed the language and import of each and gave them to the jury as coming from the party requesting them, it was held reversible error: *Peart v. Railroad Co.*, 8 S. Dak. 431, 66 N. W. 814. The rule in that state appears to be otherwise at present. It was held that the failure of the parties to request instructions did not relieve the court from the duty to instruct upon all the issues, and that an exception to an instruction limiting the jury to certain issues was sufficient to authorize a review of the action of the court in failing to submit other issues: *Wilson v. Commercial etc. Co.*, 15 S. Dak. 322, 89 N. W. 649.

⁶ 84 Cal. 476, 480, 24 Pac. 109.

⁷ 54 Cal. 442, 449, 35 Am. Rep. 77. See, also, *People v. Collins*, 48 Cal. 277; *People v. Estrada*, 49 Cal. 171.

⁸ 21 Wash. 542, 546, 58 Pac. 663.

⁹ *Howe v. West Seattle L. & I. Co.*, 21 Wash. 594, 59 Pac. 495.

is immaterial that the proper and the objectionable parts are separable, so that part might be given and the balance refused.¹⁰

Where testimony is admitted that is claimed to be incompetent as against some of several parties, the objectors should ask an instruction limiting its applicability.¹¹

The remedy for an omission from an instruction is not by exception merely, but the court's attention must be called thereto, and modification or further instruction requested.¹²

If specially requested to give an instruction, the court's action on the request constitutes a decision, which if erroneous, gives rise to an exception.¹³

Of course, if the court undertakes to declare the law, whether of its own volition, or upon request, it must state it correctly. But it need go no further. It need not state the reason or the history of the law.¹⁴

In this case the court referring to a requested instruction on the subject of negligence said: "This instruction could not be given without some qualification," and held there was no error in refusing it.

10 *Croft v. Northwestern S. S. Co.*, 20 Wash. 175, 55 Pac. 42. In this case the court said: "It is not error to refuse to give an instruction which is partly erroneous, and while this one embraced two different subjects, that might well have been submitted as separate instructions, the defendant saw fit to submit it as one, numbered the fifteenth. Consequently, error cannot be predicated upon the refusal of the court to give any part of it."

11 *Bingham v. Lipman*, 40 Or. 363, 67 Pac. 98.

12 *Allend v. Spokane Falls etc. Ry. Co.*, 21 Wash. 324, 58 Pac. 244. In this case the court said: "The latter part of the objection goes rather to what is omitted from the instruction than what is contained in it. The remedy for this defect, however, is not by an exception merely. The complaining party must call the court's attention to the omission, and request such modifications or further instructions as he may think proper. Unless this is done, this court cannot afford relief": See, also, *Box v. Kelso*, 5 Wash. 360, 31 Pac. 973; *Enoch v. Spokane Falls etc. Ry. Co.*, 6 Wash. 393, 33 Pac. 966; *Brown v. Porter*, 7 Wash. 327, 34 Pac. 1105.

13 See post, § 330.

14 *People v. Ramirez*, 56 Cal. 533, 536, 38 Am. Rep. 73. In *Lincoln v. Wright*, 23 Pa. St. 76, 82 Am. Dec. 316 and note, the court said: "A judge is bound to instruct the jury on the law itself, and not its history, object and purpose. He does his duty by saying what the law is, without an exposition of its reasons."

§ 305. Duty of court to instruct upon proper request.

The converse of the text of the preceding section is equally true; and a correct instruction which addresses itself to a theory permissible under the evidence should be given, if requested.¹⁵ Every instruction which correctly declares law applicable to the case which it supposes, if the case can be rationally inferred from the testimony, should be given;¹⁶ or as otherwise expressed, where there is evidence tending to establish a fact, the court should not refuse a proper instruction in reference to that fact.¹⁷ And it is error to refuse an instruction framed upon a reasonable hypothesis in relation to the facts on the ground that the case supposed does not include some other hypothesis equally rational.¹⁸ Within the same principle it is held that, when the evidence conflicts, each party is

¹⁵ *People v. Hecker*, 109 Cal. 451, 42 Pac. 307. See, also, *Ramsey v. Burns* (Mont.), 69 Pac. 711; *Whipple v. Preece*, 18 Utah, 454, 56 Pac. 296.

¹⁶ *People v. Taylor*, 36 Cal. 255, Refusal to instruct as to constructive notice of limitation contained in a receipt delivered by a transfer company held error: See *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915; *United States v. Cannon*, 4 Utah, 122, 7 Pac. 369, notes to 87 Am. Dec. 102, 99 Am. Dec. 126. In *People v. Taylor*, supra, the court said: "This record fails to disclose upon what grounds the first and second instructions asked on behalf of the defendant were refused; and the attorney general has failed to suggest any ground upon which the ruling of the court can be sustained. On the part of the defendant it is suggested that the only objection made to them was that the facts therein hypothetically stated did not embrace the theory of the prosecution, to the effect that the contest was provoked by the defendant for the purpose of doing murder under the pretense of self-defense. If such was the ground of the ruling, we think the ruling was erroneous. In preparing instructions each party may assume any reasonable hypothesis in relation to the facts, and ask the court to declare the law as applicable to it, and it is error to refuse merely because the case supposed does not include some other hypothesis equally rational. We are unable to detect any substantial reason why the instructions in question should not have been given. Every instruction which correctly declares the law applicable to the case which it supposes, if the case can be rationally inferred from the testimony, should be given."

¹⁷ *Davis v. Russell*, 52 Cal. 611, 615, 28 Am. Rep. 647; *Fox v. Stockton etc. A. W. Co.*, 83 Cal. 333, 23 Pac. 295.

¹⁸ *People v. Taylor*, 36 Cal. 255.

entitled to have the law given to the jury, which is applicable to his theory of the case, provided there is evidence to support it.¹⁹ But jurors are presumed to have ordinary intelligence, and neglect to instruct them on a common-place matter is not ground for reversal, when no erroneous instruction has been given.²⁰ Nor is it error to refuse instructions requested where the substance of them is fairly embraced and expressed in those given by the court.²¹

While, as above stated, it is the duty of the court, if requested, to give proper instructions, the corollary to that proposition has been declared in many decisions. The court is not bound to give a requested instruction, erroneous on its face, even though the error be not serious. The court is never bound to charge bad law.²² It is merely another form of expression

¹⁹ *Renton v. Monnier*, 17 Cal. 449. See, also, *Hunt v. Elliott*, 77 Cal. 588, 20 Pac. 132.

²⁰ *Davis v. McNear*, 101 Cal. 606, 36 Pac. 105.

²¹ *People v. Sternberg*, 111 Cal. 11, 43 Pac. 201; *Merguire v. O'Donnell*, 103 Cal. 50, 36 Pac. 1033; *People v. Johnson*, 106 Cal. 289, 36 Pac. 622; *People v. Schmitt*, 106 Cal. 48, 39 Pac. 204. See, also, *Largey v. Mantle*, 26 Mont. 264, 67 Pac. 114; *Boyd v. Portland Elec. Co.*, 40 Or. 126, 66 Pac. 576; *Crossen v. Grandy (Or.)*, 70 Pac. 906; *Roberts v. Port Blakely Mill Co. (Wash.)*, 70 Pac. 111; *Healey v. Rupp (Wash.)*, 63 Pac. 319; *Howay v. Going-Northrup Co.*, 24 Wash. 88, 85 Am. St. Rep. 942, 64 Pac. 135. Where numerous lengthy instructions are requested and the court prepares and gives instructions an objection by the party that the court instructed the jury at such length as to mislead and confuse them is not well taken: *Henke v. Babcock*, 24 Wash. 556, 64 Pac. 755.

²² *Vischer v. Webster*, 13 Cal. 61. Instructions erroneous because assuming that deceased had threatened to kill defendant properly refused: *People v. Roemer*, 114 Cal. 51, 45 Pac. 1003. Where defendant's testimony shows that he was not in dazed condition, instruction based on theory that he was, properly refused: *People v. Worthington*, 122 Cal. 583, 55 Pac. 396. Refusal of abstract instruction no error: *Proper v. Hubert*, 119 Cal. 276, 63 Am. St. Rep. 72, 51 Pac. 329. Court is not bound to adopt the language used in a requested instruction: *Parlman v. Young*, 2 Dak. 175, 4 N. W. 129, 711. While parties are entitled to have their respective theories of a case fairly presented, yet the manner of the presentation rests with the judge, and if he chooses to set forth certain opposing claims in close association it is his privilege to do so: *Bingham v. Lipman*, 40 Or. 363, 67 Pac. 98.

for the same idea when it is said that instructions are properly refused when not warranted by the pleadings.²³

Requested proper instructions which are coupled with improper instructions, so as to constitute a presumed whole, may be properly refused as a whole.²⁴ Nor is the court bound to modify an erroneous instruction requested by a party by separating or eliminating the objectionable part, but may refuse it in the first instance, without error, if not technically correct.²⁵

Where instructions given are not satisfactorily explicit, a party desiring a more explicit instruction must request it.²⁶

The court is not bound to instruct as to damages of its own motion.²⁷

²³ *Thompson v. Lee*, 8 Cal. 275; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Lathrop v. Flood*, 135 Cal. 458, 67 Pac. 683.

²⁴ *People v. Davis*, 135 Cal. 162, 67 Pac. 59. In this case the court said: "We must presume the whole unnumbered sentences to be one instruction, and if part of it was erroneous, it was not error to refuse it all. It was not the business of the trial court to pick out and separate the sentences containing sound principles of law from the erroneous portions, and after this process of separation to give the correct portions."

²⁵ *Smith v. Richmond*, 19 Cal. 476. In this case Chief Justice Field, delivering the opinion, said: "The instruction to the jury, requested by the defendant, was properly refused. Had it been given entire, it would have been erroneous. The court was not bound to separate the concluding clause and give that by itself."

²⁶ *People v. Wallace*, 109 Cal. 611, 42 Pac. 159; *Nichol v. Lau-meister*, 102 Cal. 658, 36 Pac. 925. See *Rice v. Whitmore*, 74 Cal. 619, 5 Am. St. Rep. 479, 16 Pac. 501.

²⁷ *Ellis v. Tone*, 58 Cal. 289, 297. In this case, Thornton, J., delivering the opinion said: "The second point is that the instruction did not state the true rule of damages, and gave no definite rule for ascertaining such damages. The court stated no rule of damages whatever, but in a general way. It was not bound to state such rule. It was not obliged to instruct the jury at all of its own motion. It was bound to pass on such propositions of law as were requested by either party to be given in charge to the jury, and give or refuse them in a modified form; but further than this the law did not require it to go. A failure to give any charge of its own motion was not error. If the counsel for defendants desired the court to instruct the jury more particularly as to the rule of damages, they should have presented it in the form of a request."

The court is not bound, unless requested, to instruct the jury that they are not to consider the defendant's failure to testify as presumptive evidence of guilt.²⁸

The rule that the court is not bound to instruct unless requested applies to effect of evidence which has been improperly admitted and ordered stricken out; and if a party desires specific instructions in such case, he must ask for them.²⁹

§ 306. Same subject—Exception to rule.

Instructions which the statute makes it the duty of the court to give where applicable do not come within the rule that the court is not bound to give instructions unless requested; and if the court fails, upon proper occasion, to comply with such statutes, whether or not requested so to do, it is reversible error.³⁰

§ 307. Respective duties of counsel and court in preparing, presenting and passing upon instructions.

Some importance attaches to the question of the proper stage of the trial for the presentation of instructions and requests for instructions to the judge to be examined and passed upon by him. Most trial courts have rules on the subject, and no doubt, unless the instruction were upon a vital point, the nonobservance of a reasonable rule would cast the burden upon a party who had lost the benefit of an instruction because not presented according to rule to show a good excuse for the delay. At the same time, no matter how reasonable or necessary a rule for the regulation of the business of the court, it should not be allowed to so operate as to impose hardship or work injustice to a party, whether he have or have not an excuse satisfactory to the court for failure to comply with the rules of court. No more definite general rule is deducible from

²⁸ *People v. Flynn*, 73 Cal. 511, 513, 15 Pac. 102. To same effect, *People v. Haun*, 44 Cal. 100; *People v. Ah Wee*, 48 Cal. 239; *People v. Marks*, 72 Cal. 46, 13 Pac. 149; *People v. Olsen*, 80 Cal. 128, 22 Pac. 125. But see *State v. Myers*, 8 Wash. 183, 35 Pac. 580, holding such instruction imperative whether requested or not. See, also, note on same point, *Hunt v. State*, 19 Am. St. Rep. 817.

²⁹ *People v. Kamannu*, 110 Cal. 609, 42 Pac. 1090.

³⁰ *People v. Silva*, 121 Cal. 668, 54 Pac. 146.

the California decisions, and probably the subject does not admit of a more definite statement. In *People v. Silva*,⁸¹ and in *People v. Demasters*,⁸² the instructions were asked after the time limited by the rules of court, but these decisions turned on the fact that the instructions were such as it was by statute made the duty of the court to give to the jury. Nevertheless, the language of the supreme court in both these cases is in consonance with the principle above stated. In *People v. Silva*,⁸³ the court said: "The rule of court that instructions requested by a party must be given to the court, in writing, before the argument begins, is eminently proper. Its purpose is to give to the court an opportunity to determine the correctness and propriety of the instruction, and thus prevent errors and promote justice; but when the strict observance of the rule would operate to defeat or impede justice it is always within the power of the court to suspend the rule, and it is its duty to do so." In *People v. Demasters*,⁸⁴ the court said: "Section 1159 of the Penal Code provides: 'The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense'; and a charge of an assault with intent to commit mayhem, murder, robbery, or any offense involving violence to the person, necessarily includes the assault. The rule of court referred to may be proper and beneficial as a general rule, and, when applied to doubtful and controverted questions of law, ought to be usually adhered to; but, as was said in *Pickett v. Wallace*,⁸⁵ 'Rules of court are but a means to accomplish the ends of justice, and it is always in the power of the court to suspend its own rules, or except a particular case from their operation whenever the purposes of justice require it.'" In *People v. Williams*,⁸⁶ no statutory duty was involved, and there appears to have been good reason for refusing to give the instruction, had it been given in time, but the court took occasion to very fully and clearly

⁸¹ 121 Cal. 668, 54 Pac. 146.

⁸² 105 Cal. 669, 39 Pac. 35.

⁸³ 121 Cal. 668, 670, 54 Pac. 146.

⁸⁴ 105 Cal. 669, 672, 39 Pac. 35.

⁸⁵ 54 Cal. 148.

⁸⁶ 32 Cal. 286, 287.

state what should be the guiding principle herein, and the reasons supporting it. Sanderson, J., delivering the opinion, said: "A court may undoubtedly regulate the order of its business by rules which do not conflict with law or do not impair the legal rights of parties; but it may be well doubted whether a rule of the character of the one under review may not in many cases work injustice if strictly adhered to. Independent of rules, a party would have a right to submit his instructions at any time before the jury leave the box. Counsel are better advised after hearing the argument than they can be before, and are therefore better prepared to frame their instructions at the close of the argument than at any previous stage of the trial. Counsel have a right to shape their instructions so as to rebut the theories of the other side as well as advance their own, and it may sometimes happen that they cannot do this to their entire satisfaction until after such theories have been fully presented; and it may therefore be well doubted, under all the circumstances, whether a rule which requires counsel to submit their instructions in advance of the argument, or while it is in progress, if it is to be strictly adhered to, has anything to recommend it. It is true that certain general instructions, involving matters of definition and the like, can be readily prepared before the argument, but the most valuable and useful part of the charge—that which deals directly with the particular facts of the case and the opposing theories of counsel—cannot; besides, the former is generally prepared and given by the court of its own motion, while the latter receives, or should receive, the special attention of counsel. It will rarely fail to happen that subjects for instruction, not previously thought of, will be suggested or occur to counsel pending the argument or after its close; and as one of the objects of giving instructions is to present the law of the case fully, and not partially, it would hardly be consistent with that object to reject matters of perhaps vital importance merely because they did not occur to counsel at or before a certain stage in the proceedings, and if such was the case here we should feel inclined to hold it error, as being an abuse of discretion."

But while trial courts should not enforce their rules with such technical severity as to defeat the ends for which they

were adopted—the prevention of injustice and promotion of justice—counsel, on the other hand, have no right, by neglect and inattention to the rules, to impose labor on the court which it would be impossible or very inconvenient for it to perform. And where the counsel for one of the parties, at the conclusion of the trial of a civil case, handed to the court fifty-eight written instructions, occupying twenty pages, it was held that it was not incumbent upon the judge to stop the progress of the trial for their examination, and that they were properly refused. In this case the trial court did not undertake to examine the requested instructions and proceeded to instruct the jury without reference to them. It is inferable from the language of Terry, C. J., delivering the opinion that the charge of the court of its own motion did not cover all the proper points covered by the requested instructions. He said: “It appears that on the conclusion of the trial below, which had occupied several days, the defendant’s counsel handed to the court fifty-eight written instructions, covering some twenty pages; upon this, the judge remarked that he had then no time to examine the instructions, and therefore declined to give any of them, but proceeded to instruct the jury without reference to the instructions asked by either plaintiff or defendant. Some of the instructions asked, are undoubtedly proper, and would have been given, except under the circumstances of the case. We think, if counsel desired that such a number of instructions should be given, it was at least his duty to have presented them to the court before or during the argument of the cause, in order that the judge might have arrived at a knowledge of their contents, and be able advisedly to give or refuse them. As this was not done, it was not, we conceive, incumbent on the judge to stop the progress of the cause, and keep the jury in their box until he should be able to investigate the various legal propositions contained in the instructions.”³⁷ It does not appear that there was any rule of the trial court on the subject; and, from this decision, which has never been qualified or criticised, we may deduce another rule—namely, that in the absence of any rule of court on the subject, requests for instructions should be presented in such time as will give the judge an opportunity to examine and pass upon

³⁷ *Anderson v. Parker*, 6 Cal. 197.

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them without delaying the trial, and in case of failure so to do the court's refusal to give them, will not be error warranting reversal or a new trial, though the instructions be proper, unless they cover matters which the court is directed by statute to charge, and the court fails to cover such statutory requirements of its own motion. Where, however, instructions have been handed to the court within the time prescribed by its rules, the court is not justified in refusing to pass upon them on account of their number and length. If necessary, the jury should be dismissed for a time, in order that the court may have an opportunity to consider the requests.³⁸

§ 308. No reviewable error in instructions in equity cases.

It is well settled that where issues are submitted to a jury in an equity case, whether the court adopts the verdict, or makes findings regardless of the verdict, no errors or omissions pertaining to the instructions are available for the purposes of reversal or new trial.³⁹ The reason given by the authorities for this is that the verdict of the jury in equity cases is advisory merely. In *Sweetser v. Dobbins*,⁴⁰ the court said: "But the questions invoked by the contention do not necessarily arise out of the record, for although special issues were submitted to the jury that, under the instructions of the court, returned a verdict, yet the verdict and the instructions upon which it may be said to have been predicated were disregarded by the court in the determination of the case; and the action of the court in that regard was not error. For, as has been repeatedly held before and since the adoption of the codes, the verdict of a jury, with respect to controverted facts arising in an equity case, is not conclusive upon the questions submitted, but merely advisory in its character; and the judge may, when satisfied that truth and justice require it, set aside

³⁸ *Andrews v. Runyon*, 65 Cal. 629, 634, 4 Pac. 669.

³⁹ *Sweetser v. Dobbins*, 65 Cal. 529, 4 Pac. 540; *Hewlett v. Pilcher*, 85 Cal. 542, 545, 24 Pac. 781; *Riley v. Martinelli*, 97 Cal. 575, 33 Am. St. Rep. 209, 32 Pac. 579; *Schneider v. Brown*, 85 Cal. 205, 24 Pac. 715.

⁴⁰ 65 Cal. 529, 530, 4 Pac. 540. Instructions in equity case not subject to exception: *Scheerer v. Goodwin*, 125 Cal. 154, 57 Pac. 789. Nor any ground for reversal: *Richardson v. Eureka*, 110 Cal. 441, 42 Pac. 965.

the verdict and order a new trial, or may qualify or alter any of its special findings, or disregard it, in whole or in part, and find the facts for himself. Or he may approve them in whole or in part, and if approved, they become, by adoption, the findings of the court. It was therefore a proper exercise of authority for the judge in this case, to examine the evidence in the case for himself and determine the questions at issue between the parties according to the weight of evidence, notwithstanding the proceedings taken with the jury and the verdict returned; and having, in the exercise of that authority, made and filed his written decision, in which the facts found corresponded with the verdict of the jury, error cannot be predicated of his findings, if they are sustained by the evidence, notwithstanding the previous instructions to the jury; for, having the right to disregard the verdict, he had also the right to disregard the instructions to the jury that rendered the verdict." And in *Hewlett v. Pitcher*,⁴¹ the court said: "Again, this was an equity case. Certain special issues were submitted to the jury, but the court finally adopted the findings of the jury, and found on all the issues. This being so, the refusal to give instructions is not cause for a reversal of the case. If the findings are not sustained by the evidence, they may be tested by the evidence. If erroneous conclusions are drawn from them, the question may be presented in this court, and in either event the question whether the court erred in giving or refusing instructions becomes immaterial." And for the same reason the refusal to instruct in an equity case is treated as harmless error, though the requested instruction be conceded to be correct.⁴²

§ 309. The Court must not submit questions of law to the jury.

Where the court assumes to declare the law it must exclusively perform that function and not shift it to the jury. This rule was one of the first deductions by the supreme court from the constitution. The trial court had, among other

⁴¹ 85 Cal. 542, 545, 24 Pac. 781.

⁴² See *Branger v. Chevalier*, 9 Cal. 353, where the court said: "Even conceding that the instructions had been proper, it is matter of doubt whether the refusal to give them, in a chancery case, could be assigned as error" (p. 360).

directions, instructed the jury to "take into consideration all the case and do equal justice between the parties." This was held a submission of law to the jury, consequently error, the supreme court saying: "The jury should make up their verdict from the facts, according to the law as given by the court, and then 'equal justice between the parties' will generally be the result, but if the jury are to find according to their views of equal justice, it is to be apprehended that prejudice and feeling may make that appear to be 'equal justice' in one case which would be iniquitous in another."⁴³

The court submits law to the determination of the jury when it charges it to be not possible with exactness to define or describe undue influence except in general and approximate terms, and seems to leave to the jury the determination as to what may constitute undue influence.⁴⁴ So an instruction "that the people are not permitted to assail the character of the defendant on trial in a criminal case, until the defendant has himself put his character in issue by calling witnesses and offering evidence in its support," is erroneous, among other reasons, because it presents to the jury a rule for the admissibility of evidence which was for the court to determine, and was not proper for the guidance of the jury.⁴⁵ And within

⁴³ Kelly v. Cunningham, 1 Cal. 367. See, also, Fairbank v. Woodhouse, 6 Cal. 435. See Oliver v. Hutchinson, 41 Or. 443, 69 Pac. 139, 1024. An instruction that the court will sanction any verdict the jury may return held erroneous, because leaving more to laymen than the law justifies: Bockoven v. Board of Supervisors, 13 S. Dak. 317, 83 N. W. 335. An instruction that "the jury will disregard all statements of the law made by the court which in their judgment considering the facts, are not predicated upon the evidence," while subject to the criticism that authorized the jury to pass on the applicability of instructions, did not constitute reversible error: Baldwin v. Lincoln Co. (Wash.), 69 Pac. 1081. While the rule is that questions of interpretation of written instruments are for the court, yet where the evidence showed that there were disputes as to the intentions of the parties to a written agreement and questions of rescission by disputed oral agreements, it was held not error to instruct the jury that all contracts, whether written or oral, that had been introduced in the case were before them for their consideration and "interpretation": Carstens v. Earles, 26 Wash. 676, 67 Pac. 404.

⁴⁴ Estate of Kendrick, 130 Cal. 360, 62 Pac. 605.

⁴⁵ People v. Gleason, 122 Cal. 370, 55 Pac. 123. In this case the

this rule courts are prohibited from submitting questions of construction to the jury.⁴⁶

A question as to whether there was probable cause in an action for malicious prosecution is one to be decided by the court and not submitted to the jury.⁴⁷ Nor should the construction

court said: "The above instruction contains a correct rule of law, but it is a rule of law by which a court is to be governed in determining the admissibility of evidence, and is not for the guidance of a jury in determining the effect of evidence which has not been admitted for their consideration. As there was no evidence before the jury relating to the subject matter of this instruction, the court was not justified in giving it to them, even if there could be any occasion upon which the instruction could be properly given to a jury. A jury should be instructed upon the evidence which has been admitted for their consideration, and not with reference to what would be their duty if they had an opportunity to consider evidence which has not been admitted. Instructions upon abstract rules of law which have no application to the evidence in a case tend to confuse rather than enlighten a jury, and ought not to be given": See, also, *People v. Devine*, 95 Cal. 227, 30 Pac. 378; *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15, 20 Pac. 28; *In re Calkins*, 112 Cal. 296, 44 Pac. 577.

⁴⁶ *Lockhart v. Ogden*, 30 Cal. 548, 557; *Van Vactor v. Walkup*, 46 Cal. 132; *Moody v. Palmer*, 50 Cal. 37; *Scales v. Universal L. Ins. Co.*, 42 Cal. 527.

⁴⁷ *Potter v. Seale*, 8 Cal. 220; *Grant v. Moore*, 29 Cal. 649, 651; *Hockrader v. Moore*, 44 Cal. 152. The first case was an action for malicious prosecution and the alleged error was the submission of the question of whether or not there was probable cause to the jury, the court said: "Probable cause is a mixed question of law and fact. Whether the alleged circumstances existed or not, is simply a question of fact, and conceding their existence, whether or not they constitute probable cause is a question of law. Where the circumstances are admitted, or clearly proved by uncontradicted testimony, it is the province of the court to determine the question of probable cause, and the court may order a nonsuit. But if there be a conflict of testimony, or the credibility of witnesses is to be estimated, the cause must go to a jury. As the question of probable cause is a mixed question of both law and fact it is error to submit to the jury to say whether there was probable cause. The jury have solely the right to decide in cases of reasonable doubt, whether the alleged circumstances really existed. Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." To same effect, *Emerson v. Skaggs*, 52 Cal. 247; *Eastin v. Bank of Stockton*, 66 Cal. 125, 56 Am. Rep. 77, 4 Pac. 1106; *Ball v. Rawles*, 93 Cal.

of a libel be submitted to the jury,⁴⁸ or the question whether an action is barred by the statute of limitations, the facts being ascertained.⁴⁹

§ 310. Code provisions.

Section 608 of the Code of Civil Procedure of California contains the following provision on the same subject: "In charging the jury, the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of that fact." The Penal Code of California contains no limitation supplementary to that contained in the constitution. The foregoing provision of the Code of Civil Procedure is however, a mere embodiment of the result of adjudications from time to time under the constitution, in both civil and criminal cases; so that it may be truly stated that the powers and duties of the courts herein, are the same in civil and criminal cases, and are subject to the same limitations. The only change ever made in this provision was upon the adoption of the codes, when the word "may" was substituted for "shall." The change was immaterial, however, because adjudications prior to the change construed the provision not to mean that the court should in all cases charge the jury, but to direct it, as to the method and extent in case it did so. The balance of section 608, and some other sections contain provisions concerning matters of practice, considered in the next chapter. The Penal Code also contains provisions pertaining to matters of practice.⁵⁰

232, 28 Pac. 937; S. C., 27 Am. St. Rep. 182; *People v. Kilvington*, 104 Cal. 91; S. C., 43 Am. St. Rep. 76, 37 Pac. 799; and *Sandall v. Sherman*, 107 Cal. 394, 40 Pac. 493, Approved in *Pennsylvania Co. v. Weddle*, 100 Ind. 145; *Burton v. Railway Co.*, 33 Minn. 192; and *Wright v. Ascheim*, 5 Utah, 491, 17 Pac. 125. In 26 Am. St. Rep. 141, there is an extended note on same subject where the authorities are collected and the question discussed at length.

⁴⁸ *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392.

⁴⁹ *Reed v. Swift*, 45 Cal. 256.

⁵⁰ Obviously, the provisions of practice of the Penal Code and their construction by the courts cannot be entered upon here.

§ 311. Preliminary to succeeding sections.

It seems proper here to state the points of difference between the acts of the court severally prohibited by the rules embodied in the next four sections. These are, first, the general prohibition not to charge as to matters of fact (hereinafter shown to apply only to disputed facts); secondly, that phase or method of violating this general prohibition consisting in assuming, as if it were not controverted or had been proven by uncontradicted and satisfactory evidence, a fact to establish which there is really no evidence or as, to which the evidence is conflicting; thirdly, that phase or method of violating the general prohibition consisting in the expression of an opinion as to what the evidence, which it is the province of the jury exclusively to weigh, proves; fourthly, that phase or method of violating the general prohibition which consists, not in any direct statement, assumption, or expression of the court's opinion, but in indirect or covert intimations or insinuations, which indicate a bias or partiality of the court upon the case made by the evidence favorable or adverse to either side. It sometimes happens that one and the same instruction contains all these vices; it often happens that the same instruction contains two or more of them.⁵¹ And argumentative instructions, the subject of a separate rule,⁵² often contain all or some of the above objectionable features. It should also be remarked that it is not vital that the practitioner should be able to point out these distinctions upon the spur of the moment, a general exception to instructions being sufficient;⁵³ but it is often important to him to thoroughly understand them, in order to be able to determine whether an instruction is assailable at all under the general prohibition, to do which is sometimes very difficult, unless he is able to "place his finger upon the precise point of objection."

The general prohibition is also violated by instructions touching the credibility of witnesses, and by those declaring presumptions of fact; but these violations are easily distinguishable and require no preliminary explanation.⁵⁴

⁵¹ See *People v. Matthai*, 135 Cal. 442, 67 Pac. 694. The instructions in this case seem to have contained almost every vice.

⁵² Post, § 317.

⁵³ Post, § 330.

⁵⁴ See post, §§ 318, 319.

The rules against abstract, erroneous, and conflicting instructions are not referable to the constitutional provision, but are common-law rules.⁵⁵

§ 312. The court must not charge the jury with respect to matters of fact the existence or nonexistence of which are questions to be passed upon by the jury.

This rule is a counterpart of that which forbids the court submitting questions of law to the jury; and likewise, has in view the purpose of the framers of the constitution, namely, to preserve the partition of duty and responsibility between judge and jury. Its true meaning is that the court must not decide issues which it is the province of the jury to decide. The court may under some circumstances, and often does directly apply the law to the facts, and direct a verdict to be returned in favor of one or the other party. And in practice the above rule is of no force or effect as a prohibition, either where no issue arises on the pleadings, or the evidence is sufficient and makes the case so clear for one of the parties that a verdict for the other would be set aside for insufficiency of, or because contrary to, the evidence.⁵⁶

As the methods by which the general provision may be violated are the subjects of succeeding sections, no illustrations are required at this point.

§ 313. The court must not assume the truth of any disputed issue upon which the jury are to pass.

This rule is the most important exemplification of the general prohibition, and forbids the court assuming the truth of any question of fact, the passing upon which is the proper prov-

⁵⁵ See post, §§ 321, 322, 324.

⁵⁶ See post, § 329. The court should not invade the province of the jury: *Haun v. Rio Grande W. Ry. Co.*, 22 Utah, 346, 62 Pac. 908. An instruction merely stating the claim of the plaintiff as to the facts, and not stating such facts as proved, does not usurp the province of the jury by charging it as to matter of fact: *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216. An instruction which assumed to be as claimed by one party, a matter in dispute and to which the evidence was conflicting, was held misleading and prejudicial: *Wood v. Steinau*, 9 S. Dak. 110, 68 N. W. 160.

ince of the jury.⁵⁷ In *Dean v. Ross*,⁵⁸ an instruction, among other matters, contained this expression: "So, as a matter of law, I charge you that she is responsible for this lumber that may have gone into it, consequently there is no dispute on that proposition." The responsibility of the defendant referred to in this instruction was one of the controverted questions at the trial, and the evidence was such in the opinion of the supreme court, that said defendant was entitled to have it submitted to the jury. In reversing the judgment and order denying a new trial, the supreme court said: "Appellant excepted to this feature of the charge, and now complains that it is obnoxious to section 19 of article 6 of the constitution of this state, which prohibits judges from charging juries upon questions of fact. We think it a very plain transgression of the line which separates the functions of the judge from those of the jury, and therein falls within the denunciation of the provision in question. It assumes as proven the essential fact upon which, under the theory upon which the case was tried, the right of plaintiffs to recover against appellant depended." Another excellent il-

⁵⁷ *Caldwell v. Center*, 30 Cal. 539, 89 Am. Dec. 131; *Bradley v. Lee*, 38 Cal. 362; *People v. Messersmith*, 61 Cal. 246; *Wood v. Tomlinson*, 53 Cal. 720; *Vulicevich v. Skinner*, 77 Cal. 239, 19 Pac. 424; *Llewellyn Steam etc. Co. v. Malter*, 76 Cal. 242, 18 Pac. 271; *People v. Buster*, 53 Cal. 612; *Dean v. Ross*, 105 Cal. 231, 38 Pac. 912. The court may state to the jury that a certain fact is not in issue: *Richison v. Mead*, 11 S. Dak. 639, 80 N. W. 131. Where both the making of a contract and the acceptance of goods under it were in issue and controverted by the evidence, it was error to instruct the jury that "practically the only issue in the case is the question as to whether there was a contract entered into between the parties: *Dinnie v. Johnson*, 8 N. Dak. 153.

⁵⁸ 105 Cal. 227, 230, 38 Pac. 912. In this case the court said: "The instruction assumed, against the evidence, as already shown, that defendant had repudiated the agreement—denied liability under it—and held that unless it was expressly stipulated in the agreement—which it was not—that no suit should be brought until after the amount had been fixed, then it was no defense, and the plaintiff was entitled to a verdict. It appears, therefore, very clearly that this erroneous instruction in effect disposed of the case in favor of the plaintiff." Assumption that defendant had denied a special agreement held prejudicially erroneous: *Roche v. Baldwin*, 135 Cal. 522, 528, 65 Pac. 459, 67 Pac. 903. A case in which the court assumed that an agency existed, when the evidence left the question in doubt: *Mobb v. Stewart*, 133 Cal. 556, 563, 65 Pac. 1085.

illustration of an unwarranted assumption by the court of a controverted fact in a civil case is furnished by the case of *Phelan v. Anderson*.⁵⁹ There was evidence for the plaintiff tending to show that the amount of annual rent specified in an original parol lease was changed and increased by consent of the parties for the ensuing years, and that the defendant was in partial default of rent for the year in which the action was brought, and it was a question of fact, essential for the jury to determine as to the number and character of the leases entered into between the parties. It was held that an instruction, that the only lease established was the original parol lease for years, under which the defendant entered into possession at a specified annual rental, was prejudicially erroneous, as touching upon a matter of fact, and taking from the jury the evidence for the plaintiff as to the change in the terms of rental. And where the evidence was conflicting as to whether one of the parties objected to an account stated, it was an erroneous assumption to give an instruction reading in part thus: "I therefore charge you that if you find that monthly statements were rendered by defendant to plaintiff, which were by him retained without objection, that this is but a circumstance for you to consider, and which may be explained by evidence satisfactory to yourselves, and that said retention does not necessarily bind the plaintiff." Concerning which the court said: "In this case there was, as above stated, evidence upon which the jury might have found that plaintiff did object to the accounts rendered, but there was conflicting evidence, and the instructions under consideration were based upon the assumption that no objection was made."⁶⁰ This rule is strictly enforced in criminal cases. In *People v. Ellenwood*,⁶¹ the court gave the following instruction, among others: "Now, the prosecution has brought here the directory of this city and county; has also brought here a witness who tells you he has searched in vain for such a person as F. S. Dalton; they have brought here a witness who undertakes

⁵⁹ 118 Cal. 504, 50 Pac. 685.

⁶⁰ *Shade v. The Sisson M. & L. Co.*, 115 Cal. 357, 364, 366, 47 Pac. 135, holding also that such instruction was reversibly erroneous upon exception of defendant (appellant) as containing an erroneous declaration of law.

⁶¹ 119 Cal. 166, 51 Pac. 553.

to tell you that the defendant admitted to him that Dalton was a mere fiction." The testimony to which the court here referred was that of the police officer who made the arrest, and was that when he arrested the defendant the latter "told me that there was no such man here (in San Francisco), as F. S. Dalton." The court, in reversing the judgment and ordering a new trial, said: "It might be true that Dalton's name was not in the directory, that the officer searched the city for him in vain, and that no such man was here at the time the statement was made by the defendant to the officer, and yet Dalton be a real person, and that he made the check at the time and under the circumstances detailed by the defendant; but if Dalton had no existence, was 'a mere fiction,' it could not be true that Dalton made the check, nor that defendant cashed it for him. In short, the statement made by the defendant was consistent with his innocence, while the statement as made by the court was not only inconsistent with his innocence but construed it as a direct admission of guilt. There can be no question that the court referred to the testimony of the policeman, since no other witness testified as to any conversation with the defendant upon the subject. The statement of the court put a construction upon the language of the witness, and in effect told the jury what the words spoken by the witness meant; that when the defendant said, 'there is no such man here as Dalton,' it meant that Dalton was 'a mere fiction.' It was not a statement of the evidence, but of a conclusion of fact drawn by the court from the evidence as given by the witness, a conclusion, too, that neither the court nor the jury could properly draw. Besides, it had a direct tendency to discredit the defendant's testimony, given in his own behalf, that he met Dalton in San Francisco, had known him in Los Angeles, and that he resided in New York; for if it was true that Dalton was a mere fiction, it could not be true that he ever knew and saw him, or received the check from him, while the statement made to the officer that there was no such person 'here' was entirely consistent with the facts to which he testified."

It is erroneous for the court to assume, in its instructions to the jury, that a certain fact exists, although it then submits to them the question whether or not it does exist.⁶² And an as-

⁶² Cahoon v. Marshall, 25 Cal. 197.

sumption of a fact is equally objectionable when founded on a mistake of the court as to an admission of counsel, as when based upon testimony.⁶³ The error is aggravated when the assumption consists in a supposed confession by the defendant of the crime charged when no such confession has been made.⁶⁴ On the same principle it is error to submit to the jury, as issues of fact, issues which have been settled by admissions; for instance, where the ouster of plaintiff being admitted, by the answer, the court instructs the jury that the question of ouster is one of the issues to be tried by them.⁶⁵ The vice of such an instruction consists in the fact that the entire case submitted to the jury is not the case on trial before the court, which tends to confuse and mislead as to the issues which the parties are entitled to have submitted. It was an untrue assumption of a fact, namely, the fact that an uncontroverted fact was controverted.

When some of the facts are admitted by the pleading and others controverted, care should be taken by the court not to make its instruction as to such admitted facts so broad as to mislead the jury into a belief that the admission extends to the whole case, or to some of the controverted issues; and an instruction so framed as to so mislead will constitute an unwarranted assumption and prejudicial error.⁶⁶ The case of *Blood v. Light*⁶⁷ is one which would seem to violate the rule. The

⁶³ *People v. Cotta*, 49 Cal. 166; *People v. Lee Chuck*, 74 Cal. 30, 15 Pac. 322.

⁶⁴ *People v. Strong*, 30 Cal. 151.

⁶⁵ *Taylor v. Middleton*, 67 Cal. 656, 8 Pac. 594. See, also, *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497. In the first of these cases the court said: "The court erred in instructing the jury as it did in the second instruction, that if they should find 'that the defendant in his answer, denies plaintiff's title, possession, and right of possession, and claims title, possession, and right of possession in himself, then as to the question of ouster, you are instructed to find for the plaintiff.' The construction of the pleadings was a question for the court and not for the jury. The answer admitted the ouster, and the court therefore further erred in the first instruction in telling the jury that the question of the ouster of the plaintiff by the defendant was one of the issues to be tried by them."

⁶⁶ See *In re Harris*, 81 Cal. 350, 22 Pac. 867.

⁶⁷ 31 Cal. 115.

trial court had instructed the jury that "the defendant having admitted in his answer the facts alleged in the first and second paragraphs of the complaint, they would so find for the plaintiff." There were other instructions covering the controverted facts. It was held, however, that the court did not thereby instruct the jury to find a verdict in favor of the plaintiff but only instructed them that they should find those admitted facts in favor of the plaintiff.

§ 314. Same rule—Assumption of no consequence where apparently not prejudicial.

But an assumption in instructions to the jury which in view of admissions and the condition of the evidence in the case, was not productive of any injury to the appellant, furnishes no ground of error.⁶⁸ And for the same reason of the evident absence of injury instructions containing statements of fact assumed to exist, are erroneous without prejudice where such statements are mere illustrations, and are followed by a proper and specific instruction clearly submitting all the essential facts in the case to the jury, so that they could not have been misled by the illustrative instruction.⁶⁹

§ 315. The court must not express an opinion as to what the evidence proves.

The court should not, under the guise of instructing the jury, indirectly participate in reaching a verdict by the expression, in any form of an opinion as to the effect of evidence on any issue.

⁶⁸ *Bradley v. Lee*, 38 Cal. 362. See, also, *People v. McFadden*, 65 Cal. 445, 4 Pac. 421. Compare *People v. Hurtado*, 63 Cal. 288. It is not an assumption that a fact was shown to instruct that a party "claimed" that the fact was shown by the evidence: *Carraher v. San Francisco Bridge Co.*, 81 Cal. 98, 22 Pac. 480. And merely because an instruction seems to assume a killing the question whether the deceased was killed by the defendant is not taken away from the jury: *People v. Welch*, 49 Cal. 174. Assumptions as to flight of defendant do not invade province of jury when: See *People v. Bush-ton*, 80 Cal. 160, 22 Pac. 127, 549; *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73; *Proper v. Forsythe*, 65 Cal. 101, 3 Pac. 402.

⁶⁹ *People v. Slater*, 119 Cal. 620, 51 Pac. 957.

A violation of the constitutional inhibition under this head may consist in an express direct intimation that a particular fact is proven, as to which the evidence is conflicting, or the vice may, inhere in the terms of an instruction which is too broad. Thus in a suit for damages for an entry upon mining claims, and for perpetual injunction, etc., it was held that it was error for the court to charge the jury that if they believed no injury or damage was done by defendants to plaintiffs, they would find for defendants; that such charge was calculated to mislead, inasmuch as the law presumes damages from a trespass, and under the charge the jury might have decided the case upon this want of proof of plaintiffs' damages, instead of absence of proof of their title.⁷⁰

In criminal cases especially it is of the utmost importance to the defendant that the instructions should not directly, or indirectly, assume or suggest his guilt. In *People v. Langan*,⁷¹ the court, at the request of the prosecution, gave an instruction in these words: "If the death of the deceased was accelerated by the violence of the prisoner, his guilt is not extenuated because death might, and probably would, have been the result of any disease with which the deceased was afflicted at the time of the violence." The supreme court reversing the judgment and order denying a new trial said: "The charge is quoted from an approved text-writer, and in a proper case may be accepted as sound law. But in this case it was insisted, and there was evidence tending to show, that the only blows given to deceased by the prisoner were given with the fists only, and were given in self-defense; also, that the deceased died of disease produced by injuries received otherwise than at the hands of defendant. It might, therefore, be that the 'violence of the prisoner' was not unlawful. If it was not, then no guilt would flow from it, even if death had resulted from such violence. It follows, under these circumstances, that this charge may have been misleading to the jury, and from it they may have assumed the guilt of the defendant, when with a proper modification they would not have done so."

A judge's charge to the jury should be a plain statement of the law bearing upon the facts of the case. It should be so

⁷⁰ *Atwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567.

⁷¹ 81 Cal. 142, 22 Pac. 482.

fair, impersonal, and well-balanced, that the jurors who are to be guided by it in their deliberations in the juryroom will be unable to deduce therefrom the opinion of the judge as to the merits of the case.⁷²

Within the prohibition are instructions as to the weight and value of evidence, stating what the jury are at liberty to conclude from certain facts, if found. Such instructions involve conclusions, not of law, but of the judging mind from the evidence. They are in violation of the constitutional inhibition as to instructions upon matters of fact. The court has no right to dictate or even suggest the process of reasoning by which the evidence shall be judged.⁷³ In *People v. Williams*,⁷⁴ the court gave the following instruction: "The fact that the deceased was a Chinaman gave the defendant no more right to take his life than if he had been a white person; nor did the fact, if you so find, that the defendant was seeking to enforce the collection of taxes against another Chinaman, or even against his victim, give the defendant any right to take his life. Our laws do not sanction the sacrifice of human life in order to enforce the collection of taxes." The supreme court held that the use of the word "victim" in the connection in which it was used was calculated to convey the impression that in the opinion of the court the killing was unlawful, and for this reason reversed the judgment, saying: "The word 'victim,' in the connection in which it appears, is an unguarded expression, calculated, though doubtless unintentionally, to create prejudice against the accused. It seems to assume that the deceased was wrongfully killed, when the very issue was to the character of the killing. We are not disposed to criticise language very closely in order to reverse a judgment of this sort, but it is apparent that

⁷² See *People v. Stanton*, 106 Cal. 139, 39 Pac. 525; *People v. Hertz*, 105 Cal. 660, 39 Pac. 32, is also a case in which an instruction was criticised as reversing the opinion of the court and for the error in giving it the judgment was reversed and a new trial ordered.

⁷³ *Estate of Carpenter*, 94 Cal. 406, 29 Pac. 1101. It is the province of the jury to weigh the evidence and find the facts in the case, and an instruction by the court that any particular evidence which has been laid before them is not entitled to weight or consideration, from them is an invasion of such province: *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 481.

⁷⁴ 17 Cal. 146, 147.

in a case of conflicting proofs, even an equivocal expression coming from the judge, may be fatal to the prisoner. When the deceased is referred to as a 'victim,' the impression is naturally created that some unlawful power or dominion had been exerted over his person. And it was nearly equivalent, in effect, to an expression characterizing the defendant as a criminal. The court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression. The experience of many lawyers shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the court. A word, a look, or a tone may sometimes, in such cases, be of great or even controlling influence." In *People v. Dick*,⁷⁵ the language objected to was as follows: "The defendant is charged with having murdered, in this county, on or about the twelfth day of May, 1866, one S. M. Simpson. Now, the first question for your decision is this: Was S. M. Simpson, on or about the 14th of May, 1866, in this county, murdered? In determining that question, the court thinks, you can have no hesitation whatever." Although the evidence was not before the supreme court, yet, for this instruction the judgment was reversed and a new trial ordered, the court saying: "We are of the opinion, however, that the other portion of the charge noted is within the clause of the constitution which prohibits judges from charging juries upon matters of fact, and are unable to conceive of any state of facts under which, in view of that restriction, a judge can be allowed to address such language to a jury. It is manifest from the passage referred to, taken in connection with the rest of the charge, that the jury must have understood the judge to intimate that, in his opinion, the evidence was sufficient to justify them in finding the crime of murder to have been committed by somebody, and that the only question for serious consideration was, whether the defendant was the guilty party. This, we think, was error, and one or two other passages of a somewhat similar character are also objectionable." In *People*

⁷⁵ 34 Cal. 663.

v. Strong,⁷⁶ the trial court had instructed the jury thus: "You may give to the defendant's admissions and confessions such weight as you may deem them entitled to, judging from the circumstances under which they were given, and the motives which would naturally actuate the party giving them, and that you may, in your discretion, believe a part and disbelieve a part of such admissions and confessions." Of this the court said: "To this the defendant's counsel excepted, and we think the exception well taken. From an examination of the evidence we have been unable to discover anything therein which by any fair construction can be called a confession. The attorney general, who represents the people in this court, has not, though his attention has been called to it, undertaken to point out anything in the testimony of the witnesses even tending to prove a confession on the part of the defendant of any participation in the commission of the alleged homicide." The supreme court, held that even if the evidence had tended to prove that the defendant had in any degree admitted or confessed participation in the crime with which he stood charged, it was for the jury to determine whether such evidence amounted to proof of the fact, reversed the judgment and ordered a new trial.

The instruction objected to in *People v. Buster*,⁷⁷ was not only an intimation, but a strong assertion by the court of the truth of the vital assertion of the prosecution, and a new trial was for that reason ordered.

§ 316. The court must not, in its charge, exhibit partiality for either side, or intimate how the jury should decide.

This rule is inserted among the others simply because it has been heretofore generally treated as one of the fundamental rules on this subject, and its total omission might not be understood. Really, no case of violation of the constitutional provision could be specified or cited under it which could not be with greater propriety classed as coming within other rules of negation herein. Most instructions which exhibit partiality or bias are argumentative,⁷⁸ and those not so either express an opinion as

⁷⁶ 30 Cal. 151, 157.

⁷⁷ 53 Cal. 612.

⁷⁸ See next section.

to what the evidence proves or comment on the relative credibility of witnesses.⁷⁹

Where partiality or bias is found in language of the judge, not contained in his charge, or in acts calculated to influence the jury against a party it constitutes irregularity, elsewhere discussed.⁸⁰

§ 317. The court must not give argumentative instructions.

A chief objection to an argumentative instruction is that, in giving it, the court usurps a function of the jury by an assumption as to the weight of evidence; another is that it indicates bias, partiality, impression or opinion on the part of the court favorable to one party and against the other.⁸¹ An oral charge by the court often becomes argumentative, confusing

⁷⁹ See § 319.

⁸⁰ See chapter 4.

⁸¹ See *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 481. In this case it was held that a closing paragraph in the same instruction to the effect that it was for the jury to give to the evidence the consideration to which it was entitled did not obviate the error, committed by the court in giving the argumentative instructions. An instruction in an action against a city for personal injuries caused by an obstructed sidewalk, that if plaintiff knew its condition, but forgot such fact, and that it was by reason of his forgetting such defective condition that he was injured—that is because of such forgetfulness he failed to exercise due care—and such failure to so remember was the approximate cause of the injury, then he could not recover, was held to be argumentative and confusing: *Cowie v. Seattle (City of)*, 22 Wash. 659, 62 Pac. 121. It was held to be the expression of an opinion as to the weight of evidence and to require the ordering of a new trial, where, after the jury had informed the court that there was no prospect of an agreement on a verdict, the judge remarked: "Feeling as I do about the matter, I do not see any reason why a jury should disagree . . . although I do not care to force any man against his conscience, to agree to a verdict which he does not believe in. . . . Feeling as I do about the case. . . . I do not feel that I should discharge you." The supreme court, in ordering a reversal and new trial, reasoned that, since, if the evidence was insufficient to support a verdict of guilty, it is the duty of the court to direct a verdict of acquittal, having submitted the case to the jury on the evidence, such remarks could only be interpreted to mean that the court believed the evidence warranted a verdict of guilty: *State v. Fisher*, 23 Mont. 540, 59 Pac. 919,

and misleading from inadvertence, and lack of time for previous consideration and choice of language in the hurry and perplexities of the trial.⁸² The opposite of an argumentative instruction is one containing a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court, as to any fact in the case.⁸³ An instruction in a will contest, which purported to enumerate circumstances proving undue influence, which might merely tend to show undue influence, but which were in no wise conclusive thereof, and which declared it not possible with exactness to define or describe undue influence except in general and approximate terms, and seemed to leave to the jury the determination as to what may constitute undue influence, was held to be argumentative and therefore cause for reversal.⁸⁴ And an instruction "that the people are not permitted to assail the character of the defendant on trial in a criminal case, until the defendant has himself put his character in issue by calling witnesses and offering evidence in its support," is erroneous because argumentative, confusing and misleading in that it suggests to the jury the possibility that his character was not good, and that the presumption in his favor might have been overcome but for his failure to support it by evidence.⁸⁵

An argumentative extract read from a law book as part of the court's charge to the jury is as much a violation of the rule as if it were in the ordinary form. In *People v. Purcell*,⁸⁶ the court, in its charge to the jury upon the subject of circumstantial evidence, read quite a long extract from the opinion of the court in another case, which contained really quite an argument in favor of the conclusiveness of circumstantial evidence, and a statement that such evidence was sufficient if it warranted a belief, "as strong and certain as that on which discreet men are accustomed to act in relation to their most

⁸² *People v. Paulsell*, 115 Cal. 6, 13, 46 Pac. 734.

⁸³ *People v. McNamara*, 94 Cal. 509, 29 Pac. 953.

⁸⁴ *Estate of Kendrick*, 130 Cal. 360, 62 Pac. 605. The instruction described in this case is amenable to the further objection that it submitted a question of law to the jury. See ante, § 000.

⁸⁵ *People v. Gleason*, 122 Cal. 370, 55 Pac. 123.

⁸⁶ 115 Cal. 6, 13, 46 Pac. 734.

important concerns”; and then told the jury that the part of said opinion just quoted was not the law of the state. The supreme court held such course to be improper, but as there was another ground for reversal did not decide whether or not it would be sufficient reason for reversal.

Under the head of argumentative instructions are those which draw comparison between direct and circumstantial evidence to the detriment of one of the parties. In the Hoff case (*People v. Vereneseneckockockhoff*)⁸⁷ it was held, overruling a line of decisions beginning with *People v. Cronin*,⁸⁸ that an instruction that “it may be impossible to show or establish a motive, for the reason that we cannot fathom the mind of the accused on trial, and ascertain if there is not a hidden desire of vengeance or some passion to be gratified,” was argumentative against the defendant on the facts, and was an improper charge as to a matter of fact.

An instruction differing somewhat in phraseology but containing the same vice pointed out in the Hoff case came again before the court in *People v. O’Brien*,⁸⁹ and resulted in a reversal. The instruction was less objectionable than that complained of in either the Cronin case or the Hoff case; nevertheless the court said of it (per Smith, C.): “On the whole, therefore, the instruction was not only erroneous, but prejudicial to the accused.” The decision was signed by Justices Harrison, Van Dyke, and Garoutte, the latter two having dissented in the Hoff case, and on authority of the last-mentioned case, *People v. Botkin*,⁹⁰ was reversed, the instructions being almost identical: But an instruction is not objectionable as argumentative, where its form to which objection is taken finds support in the evidence. And, although in giving an instruction on the subject of feigning insanity, the court should be careful to follow approved language, yet when essential, and the defense of insanity was lacking in material substance, it was held that such an instruc-

⁸⁷ 129 Cal. 497, 58 Pac. 156, 62 Pac. 111.

⁸⁸ 34 Cal. 191. Overruled cases on this point include *People v. Morrow*, 60 Cal. 142; *People v. Urquidas*, 96 Cal. 241, 31 Pac. 52; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

⁸⁹ 130 Cal. 1, 10, 62 Pac. 297.

⁹⁰ 132 Cal. 231, 84 Am. St. Rep. 39, 64 Pac. 286.

tion might be properly given.⁹¹ In *People v. Wilder*,⁹² exception was taken to the following instruction: "There is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence. A man may as well swear falsely to an absolute knowledge of the facts as to a number of facts, from which, if true, the facts on which the guilt or innocence depends, must inevitably follow." Upon this the court, in affirming the judgment, said: "It may be said that as to this instruction containing a declaration of law there may be grave doubt, but as to the statements there contained not being prejudicially erroneous, there is no doubt. The Hoff case does not go to the length of holding such an instruction reversible error."

§ 318. The court must not charge as to any presumptions of fact.

Nor should the judge state to the jury any presumptions of fact, as arising from any other facts or evidence in the case. To instruct the jury that they are authorized to find one fact from the existence of other facts is different from telling them that the existence of a fact tends to prove another fact, the first form of instruction being erroneous and the latter permissible. A case clearly illustrative of this distinction was *Stone v. Geyser G. Min. Co.*⁹³

Where the objectionable features appeared in several interdependent instructions, too lengthy for insertion here, the court said: "The charge was also erroneous in that the court informed the jury that a presumption of fact was created by the proof of other facts. Such was, in effect, the instruction that, if cer-

⁹¹ *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073. To same effect, *People v. Kettick*, 126 Cal. 425, 58 Pac. 918. See, also, *People v. Kloss*, 115 Cal. 158, 47 Pac. 459; *People v. Allender*, 117 Cal. 81, 48 Pac. 1014.

⁹² 134 Cal. 182, 184, 66 Pac. 228. To same effect, *People v. Howard*, 135 Cal. 266, 67 Pac. 148.

⁹³ 52 Cal. 315: Citing *People v. Walden*, 51 Cal. 588. It was held that an instruction in a case of disputed boundaries that "the line as fixed by the surveyor at this time is presumptively correct" could not be upheld: *Radford v. Johnson*, 8 N. Dak. 182, 77 N. W. 601.

tain facts were established, the jury would be authorized to find an abandonment. It is erroneous for the court to charge that the existence of facts developed in the evidence 'raises a reasonable presumption' of the existence of another fact. To say to the jury that they would be authorized to find a fact because of the existence of another, is but saying that the existence of the latter raises the reasonable presumption of the existence of the former, since the jury can find the former only as a presumption from the existence of the latter. It is a very different thing from saying that one fact tends to prove another. It is the duty of the court to pass upon questions as to the admissibility of evidence, but it is solely the province of the jury to determine questions of fact, and this includes the duty of ascertaining the existence of a fact from the existence of other facts, without the aid of any rule of law."⁹⁴ And in a criminal prosecution for rape there is no presumption of chastity as against the presumption of innocence in favor of the defendant, though there may be an inference of previous chastity, which the jury may infer without evidence. The jury, however, are the exclusive judges of the weight and validity of the inference, and it is error to instruct the jury, in such a case that "the law presumes a woman to be chaste until the contrary is shown."⁹⁵

The proper form, therefore, of calling the attention of the jury to evidence, which has been introduced, in order that its important bearing on the issue may not be overlooked, is for the court to instruct the jury that evidence has been introduced tending to prove a given matter or fact. Such instruction is not an expression of the opinion of the court as to the weight or effect of the evidence, nor as to what fact has been proven.⁹⁶ And it has been held that an instruction, singling out and giving prominence to certain portions of the evidence is not error.⁹⁷

⁹⁴ See, also, *People v. Carillo*, 54 Cal. 63; 1 *Greenleaf on Evidence*, 48; *Pico v. Stevens*, 18 Cal. 376. A mere statement to the jury that there is a conflict in the evidence in certain respects is not an expression of an opinion upon the weight of the evidence: *People v. Flynn*, 73 Cal. 511, 15 Pac. 102.

⁹⁵ *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297.

⁹⁶ *People v. Vasquez*, 49 Cal. 560; *People v. Welch*, 49 Cal. 174.

⁹⁷ *People v. Hawes*, 98 Cal. 648, 33 Pac. 791.

§ 319. The court must not charge as to the credibility of witnesses, or draw invidious comparisons between direct and circumstantial evidence.

The rule, with reference to the credibility of witnesses, may be stated, in somewhat amplified form, as follows: The court in charging the jury with respect to the credibility of witnesses should be careful not to disclose belief or disbelief as to the testimony of particular witnesses, and if it does, such charge is an invasion of the province of the jury, who are the sole judges of the credibility of witnesses, and of the weight to be attached to their testimony.⁹⁸

To weigh the evidence, and find the facts in any case is the province of the jury, and that province is invaded by the court, whenever it instructs them that any particular evidence, which has been laid before them, is or is not entitled to receive weight or consideration from them.⁹⁹

⁹⁸ *People v. Compton*, 123 Cal. 403, 56 Pac. 44; *Haun v. Rio Grande etc. Ry. Co.*, 22 Utah, 346, 62 Pac. 908; *Utah Rev. Stats.*, 1898, §§ 3478, 3479; *First Nat. Bank v. Minneapolis & N. El. Co.* (N. Dak.), 91 N. W. 436; *McPherrin v. Jones*, 65 N. W. 685, 5 N. Dak. 261; *Cameron v. Wentworth*, 23 Mont. 70, 57 Pac. 648; *Crossen v. Oliver*, 41 Or. 505, 69 Pac. 308; *Gilmore v. Seattle etc. Ry. Co.* (Wash.), 69 Pac. 743. Held, error: an illustration which authorizes the jury to disregard the entire uncorroborated testimony of a witness in instances where it is "probable" that he has deliberately and intentionally testified falsely as to some material matter. It authorizes the jury to judge of the effect of evidence arbitrarily: *Cameron v. Wentworth*, 23 Mont. 70, 57 Pac. 648; to instruct that in considering the weight of testimony the jury must consider not so much the number of witnesses to any given fact, but the quality of the testimony: *Gilmore v. Seattle etc. Ry. Co.* (Wash.), 69 Pac. 743. It is error to instruct that the testimony of an expert should be viewed with caution, since expert testimony is entitled to be weighed by the same tests as other testimony. And where the term "caution" is reiterated in an instruction concerning such testimony, it is erroneous on the further ground, that it tends to single out and impair its weight: *Gustafson v. Seattle Traction Co.*, 28 Wash. 227, 68 Pac. 721.

⁹⁹ *Kauffman v. Maier*, 94 Cal. 269, 283, 29 Pac. 481; *People v. Walden*, 51 Cal. 588; *People v. Fong Ching*, 78 Cal. 173, 20 Pac. 396; *Mauro v. Platt*, 62 Ill. 450; *Corn v. Galligan*, 113 Mass. 202; *People v. Dick*, 34 Cal. 666. Affirmative testimony, unless of greater weight than negative testimony, cannot be of higher character; and an in-

But while the court should not suggest that more credence be given to one witness than to another, or express belief or disbelief in part of the testimony, yet it may certainly state the legal tests with respect to the credibility of all witnesses in the case. In *People v. Hitchcock*,¹⁰⁰ it was urged by counsel for appellant that the charge in a statute, since the case of *People v. Cronin*, had destroyed the authority of that case, in this respect. But the court held that the power of the court herein did not vest upon the statute then in force,¹⁰¹ but was inherent in the courts, and, further, that neither the constitution nor any statute prohibits an instruction as to the credibility of witnesses.

Some difficulty, appears to have been encountered in distinguishing between cases where courts have properly instructed with references to the credibility of witnesses, and cases where the court, in an attempt to so instruct have gone too far and violated the constitutional inhibition in other respects. The cases of *People v. Williams*,¹⁰² *People v. Eckert*,¹⁰³ *McMinn v. Whelan*,¹⁰⁴ *People v. Barry*,¹⁰⁵ and perhaps some other cases,¹⁰⁶ have been sometimes cited as supporting the proposi-

struction which directs the jury in their deliberations to give greater weight to the affirmative testimony of the defendant's credible witnesses than to the negative testimony of plaintiff's credible witnesses is erroneous: *Haun v. Rio Grande etc. Ry. Co.*, 22 Utah, 346, 62 Pac. 908.

100 104 Cal. 482, 38 Pac. 198. Not error to instruct jury that "the jury is not bound to believe the testimony of any witness" if followed by instruction that they are the sole judges of the weight of evidence, and correctly lays down to them the rules for determining its weight: *United States v. Bassett*, 5 Utah, 131, 13 Pac. 237. The court may properly instruct the jury, in a proper case that they should regard the testimony as to admissions made by a party with caution when it comes from witnesses antagonistic to such party, since the court may infer that the witnesses are antagonistic: *Fleishner v. Beaver*, 21 Wash. 6, 56 Pac. 840.

101 Stats. 1865-66, p. 865.

102 57 Cal. 110.

103 16 Cal. 113.

104 27 Cal. 319.

105 31 Cal. 358.

106 See *People v. Lang*, 104 Cal. 363, 366, 37 Pac. 1031, where, the true criticism upon the instruction was that it was argumentative and disclosed the opinion of the court to the effect that the defendant was not to be believed.

tion that trial courts may not instruct juries upon the credibility of witnesses, except generally, or abstractly. But a careful examination of these cases will disclose that each instruction there excepted to was objectionable for some additional reason, either that it contained an assumption of fact, which should have been submitted to the jury, or was argumentative, or erroneous, in other respects, as legal propositions. Nevertheless, it is error for the judge, in his instruction to the jury, to single out a particular witness and direct cautionary instructions against his testimony, as such a cause would tend to convey to the jury, the impression that the particular witness is disbelieved by the judge. The Code of Civil Procedure of California,¹⁰⁷ lays down a well-known rule of evidence. "That a witness false in one part of his testimony is to be distrusted in others," and this rule applies to all witnesses, whether for one party or the other. In *Thomas v. Gates*,¹⁰⁸ it was assigned for error that the trial court refused an instruction that if the jury believed from the evidence that the plaintiff, in her deposition, willfully swore falsely in regard to any material fact,

107 § 2061, subd. 3. The important point in *People v. Paulsell*, 115 Cal. 6, 46 Pac. 734, is that the courts, in giving instruction upon the subject of the distrust of a witness who is false in one part of his testimony should carefully use the exact language of section 2061 of the Code of Civil Procedure, which provides "that a witness false in one part of his testimony is to be 'distrusted' in others."

108 126 Cal. 1, 4, 5, 58 Pac. 315. Followed in *People v. Arlington*, 131 Cal. 231, 63 Pac. 347. The instructions in *People v. Hertz*, 105 Cal. 663, 39 Pac. 32; *People v. Shattuck*, 109 Cal. 681, 42 Pac. 315; *People v. Van Ewan*, 111 Cal. 149, 43 Pac. 520, contained the same vice as in other cases reflecting on particular witnesses. An instruction that what a defendant said in a conversation with a witness in favor of himself must be taken as true if what he said against himself is taken as true is erroneous: *People v. Graham*, 21 Cal. 261. It is erroneous both because incorrect as a legal proposition and the expression of an opinion upon the effect of evidence. It was held that it was not error to instruct the jury that a case might arise wherein a jury might be justified in finding a verdict for a party upon the testimony of any greater number of witnesses. Being true as a legal proposition could not prejudice the defendant: *People v. Chun Heong*, 86 Cal. 329, 24 Pac. 1021. But notwithstanding this decision, if applicable to the case before the court it would seem to be a direct comment on both the weight of evidence and the credibility of witnesses, therefore erroneous.

then the whole of her testimony should be distrusted. A second instruction also refused was that, if any witness for the plaintiff willfully swore falsely in regard to any material fact the whole of the testimony of such witness should be looked upon with distrust and suspicion. It was held, that both instructions were properly refused. In the opinion the court said: "If the rule had been asked for as given in the code, and as applying to all witnesses, whether for plaintiff or defendant, no doubt it would have been given, and, if the court had refused the instruction when so requested, we would certainly hold such refusal to be error. But we do not think that the attention of the jury should be called to the rule as applying to one of the parties and not to the other, or as applying to the witnesses for the plaintiff and not to the witnesses for the defendant. If the instructions had been given, the jury might well infer that the rule applied only to the plaintiffs and their witnesses, and not to the defendant or his witnesses. Counsel for defendant evidently desired to create this impression upon the jury, or else they would have asked for the general rule. If one of the parties to litigation, either plaintiff or defendant, can be singled out, and an abstract rule of evidence applied to him, or if the witnesses for plaintiff or defendant can be singled out as a class and the rule applied to them, it could, upon the same principle, be applied to any one witness to the exclusion of others." In this case it was said that the case of *O'Rourke v. Vennekohl*,¹⁰⁹ contains a dicta in apparent conflict with what was decided, in the above case.

The rule being based upon the purpose to preserve to the jury and the court, respectively their proper functions, it is equally erroneous for the judge to call the attention of the jury to the fact, that the testimony of a witness is corroborated.¹¹⁰

An equally objectionable invasion of the constitutional provision as that which consists in unwarranted comments upon the credibility of witnesses, are instructions which by comparison or otherwise disparage, or seek to enhance the value, of a particular character of evidence; for instance, by making an invidious comparison between direct and circumstantial evidence,

¹⁰⁹ 104 Cal. 254, 37 Pac. 930.

¹¹⁰ *People v. Gordon*, 88 Cal. 422, 26 Pac. 502.

to the obvious or presumptive prejudice of a party. These may, and often fall under that head of invasion known as argumentative instructions; but the invasion may sometimes be so direct and palpable as to properly come under this head. In the Hoff case, (*People v. Vereneseneckockockhoff*),¹¹¹ both methods or forms of violation are found. The court's charge in that case contained many phrases and expressions which were subjects of criticism by the appellate court, but one of those to which special attention was directed was the words, "circumstantial evidence has this great advantage, that various circumstances from various sources are not likely to be fabricated." Upon this Temple, J., delivering the opinion remarked: "This is a possible case; was it so in this case? And, as instructions should be pertinent to the evidence, was it telling the jury that in this case there were various circumstances against the defendant, derived from various sources which were not likely to be fabricated? The court told the jury that this species of evidence was not entitled to an inferior degree of credit, and to so convince the jury was evidently the purpose of this long charge. Whether it is entitled to such credit or not is a question in each case to be determined by the jury from the evidence." The above case overrules *People v. Cronin*,¹¹² and several subsequent cases which adopted its doctrine on this point, some of the overruled cases are cited in the above-mentioned opinion of Temple, J., and in that of Beatty, C. J., delivering the majority opinion after rehearing, in which the decision was upheld. In *People v. Rushing*,¹¹³ the instructions in the Cronin case again came up for review. The instruction therein on circumstantial evidence had been copied and followed by the trial

¹¹¹ 129 Cal. 497, 58 Pac. 156, 62 Pac. 111.

¹¹² 34 Cal. 191.

¹¹³ 130 Cal. 449, 454, 62 Pac. 742. In the opinion the following appears: "The instruction is copied from the opinion of Judge Sanderson in *People v. Cronin*, 34 Cal. 202, and while criticised was not held to be error in *People v. Dole*, 122 Cal. 495, 68 Am. St. Rep. 50, 55 Pac. 581. In the latter case, in an opinion written by the chief justice, the instruction is criticised as being "inexact and illogical," but it was held that the vice was corrected by the special instruction (as in this case) "that every essential to sustain the hypothesis of guilt and to exclude the hypothesis of innocence must be fully proved."

court, Mr. Commissioner Cooper, writing the opinion overlooked the Hoff case and that of *People v. O'Brien*,¹¹⁴ and adopted the doctrine of the repudiated Cronin case. But subsequently to the decision in *People v. Rushing*, the Hoff case was followed in *People v. Botkin*,¹¹⁵ and in *People v. Enright*.¹¹⁶

§ 320. The court must not give ambiguous or uncertain instructions.

Closely akin to argumentative instructions and to those which unduly comment upon evidence and credibility of witnesses are those which because of their uncertainty or ambiguity tend to confuse or mislead the jury.

If the court charge the jury, its charge must be reasonably clear, and free from confusing and misleading ambiguity and uncertainty. An instruction which is so ambiguous that conclusions clearly prejudicial to a party may be drawn therefrom by the jury is erroneous.¹¹⁷

This rule would not justify a reversal or new trial if the instruction in question be merely subject to criticism as to its grammatical construction or contain literary defects, or clerical errors. An instruction, though defective in some or all of these respects should be considered in the light of a common understanding, and also in connection with its context. In *People v. Alsemi*,¹¹⁸ the objection was to an ungrammatical and somewhat ambiguous instruction. The court said: "It must be conceded that this particular paragraph of the instructions is not artistically drawn; but the question is, Was the jury misled by it? To determine this, we must consider it by the light of common understanding, rather than the strict rules of grammar, and also in connection with its context. So considered, and read in connection with all that the judge said

¹¹⁴ 130 Cal. 1, 62 Pac. 297.

¹¹⁵ 132 Cal. 231, 84 Am. St. Rep. 39, 64 Pac. 286.

¹¹⁶ 134 Cal. 527, 66 Pac. 726.

¹¹⁷ *People v. Maxwell*, 24 Cal. 14. See, also, *Estate of Hulbert*, 57 Cal. 257.

¹¹⁸ 85 Cal. 434, 24 Pac. 810. See, also, *Doty v. O'Neal*, 95 Cal. 244, 30 Pac. 526.

upon the subject to which it related, it seems impossible that the jury could have been misled by this single sentence of the charge on that subject. As printed in the record, each sentence of the instruction is given as a separate paragraph; but upon examination it will be found that the one here quoted and the seven paragraphs next preceding it constitute the instruction of the court on the subject referred to, and in the said seven paragraphs the court has most clearly and correctly laid down the law on that subject. All the balance of the charge on the subject is free from ambiguity, and we cannot conceive that the jury, after so clear an exposition of the law, were misled by a single sentence of this kind."

Uncertain and vague instructions tending to cloud the minds of the jury are as objectionable as ambiguous and inconsistent instructions,¹¹⁹ so an instruction may be too broad, and therefore uncertain, and warrant a refusal to give it on account of its tendency to mislead the jury.¹²⁰

§ 321. The court should not declare abstract principles of law to the jury.

The purpose of the rule against abstract instructions, is to prevent the jury being misled and confused by a diversion of their minds to subjects not properly before them. Such is the natural tendency of declarations of law inapplicable to the evidence.¹²¹ And an abstract instruction on the subject of undue influence in a will contest was held to have been misleading be-

¹¹⁹ *People v. Elliott*, 90 Cal. 586, 27 Pac. 433; *People v. Lee Gam*, 69 Cal. 552, 11 Pac. 183; *People v. Best*, 39 Cal. 690.

¹²⁰ *People v. Walters*, 98 Cal. 138, 32 Pac. 864.

¹²¹ See *People v. Sanchez*, 24 Cal. 17; *People Lapique*, 136 Cal. 503, 506, 69 Pac. 226. See, also, *Razzo v. Varni*, 81 Cal. 289, 22 Pac. 848; *Stevens v. San Francisco etc. R. R. Co.*, 100 Cal. 554, 35 Pac. 165; *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657; *Hanks v. Naglee*, 54 Cal. 51, 35 Am. Rep. 67, note; *Perkins v. Eckert*, 55 Cal. 400; *Whitman v. Steiger*, 46 Cal. 256; *People v. Fine*, 77 Cal. 147, 19 Cal. 269; *People v. Daniels*, 70 Cal. 521, 11 Pac. 655; *People v. Davis*, 47 Cal. 93; *Aguire v. Alexander*, 58 Cal. 21, 30; *Conlin v. San Francisco etc. R. R. Co.*, 36 Cal. 404; *Shepherd v. Jones*, 71 Cal. 223, 16 Pac. 711; *Mecham v. McKay*, 37 Cal. 154; *Welter v. Leistikow*, 9 N. Dak. 283, 83 N. W. 9; *Erricson v. Owyhee Ditch Co.*, 37 Or. 577, 62 Pac. 13; *Carson v. Lauer*, 40 Or. 269, 65 Pac. 1060; *Einseidler v.*

cause there was evidence in the record to which, though inapplicable, yet the jury might have applied it.¹²²

An inapplicable or abstract instruction is also an erroneous instruction when it contains a false assumption with reference to a fact, or the condition of the record as made by the evidence. Thus, an instruction was held to have been properly refused where the testimony of the prosecuting witness in a prosecution for rape, was corroborated by other evidence and the instruction so refused cautioned the jury as to the danger of convicting the accused upon the sole testimony of the prosecutrix.¹²³

Keeping in view the purpose of the rule, it is obvious that not every abstract instruction which may be given will justify a reversal, or new trial. In *George v. Los Angeles Ry. Co.*,¹²⁴ the court, speaking with reference to an inapplicable instruction, remarked: "It was apparently outside the issues, still, we cannot see how it could have misled the jury, especially as they were fully instructed as to the facts in the case. The rule invoked by plaintiff does not go so far as to make all irrelevant instructions error. It must appear that they at least tended to mislead." And where the court instructed the jury in a criminal case that a certain defense, there self-defense, was not in

Whitman County, 22 Wash. 388, 60 Pac. 1122. An instruction based upon evidence that has been stricken out is erroneous: *Nye v. Kelly*, 19 Wash. 73, 52 Pac. 528. Same rule where the only evidence to which the instruction could apply has been excluded: *Stevenson v. West Seattle L. & I. Co.*, 22 Wash. 84, 60 Pac. 51. Where there was no evidence that the construction of an elevator was complicated and dangerous, it was error for the court to charge the jury as to the duty of the defendant, the action being for personal injuries, to give plaintiff notice of its complicated and dangerous character: *Kirby v. Rainier-Grand Hotel Co.*, 28 Wash. 705, 69 Pac. 378.

¹²² In *re Calkins*, 112 Cal. 296, 303, 44 Pac. 577. For another instance of abstract instruction, see *Tompkins v. Montgomery*, 123 Cal. 219, 55 Pac. 997. Where no evidence that if defendant guilty at all he was guilty of less degree of homicide than murder, not error to refuse an instruction relating to crime of manslaughter: *People v. Chaves*, 122 Cal. 134, 54 Pac. 596; *People v. Fellows*, 122 Cal. 233, 54 Pac. 830.

¹²³ *People v. Rangod*, 112 Cal. 669, 44 Pac. 1071.

¹²⁴ 126 Cal. 357, 361, 77 Am. St. Rep. 184, 58 Pac. 819.

the case, there being no evidence tending to establish such defense, it was held that, while it was strictly speaking, an abstract or inapplicable instruction, and might, under some circumstances be argumentative and confusing, yet it was not prejudicial to the defendant, the sole defense made in the case being insanity.¹²⁵

In *People v. Cochran*,¹²⁶ it was first held with respect to abstract instructions, that the rule is reversed as regards their presumptive effect, and that presumptively, an erroneous instruction, inapplicable to any evidence submitted to the jury, has not prejudiced the objecting party; that it was only where it is manifest that the jury have been misled that such an instruction constitutes error warranting a reversal or a new trial. Prior to the foregoing decision it was generally held that the error of giving an inapplicable instruction was per se cause for reversal, unless the record showed there was no resulting injury.¹²⁷ And the former view has been subsequently taken by the supreme court, in several cases citing the decision prior to *People v. Cochran*,¹²⁸ nor has the case of *People v. Cochran*, been followed in any California case. And in *People v. Smith*,¹²⁹ The court expressly declared the rule to be that an inapplicable instruction is presumably injurious, but that the presumption of injury might be rebuttal and overcome by an affirmative showing or appearance upon the record that the error was harmless.

And yet notwithstanding some laxity of expressions found in various opinions, the proposition heretofore stated, namely, that the inapplicable instruction must, in order to justify a reversal or new trial, at least be calculated to mislead the jury to the prejudice of a party may be considered sound upon authority. And in most of the decisions the court dwells upon

¹²⁵ *People v. Worthington*, 115 Cal. 242, 46 Pac. 1061.

¹²⁶ 61 Cal. 548. See, also, *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415, 9 Am. St. Rep. 216, 18 Pac. 758.

¹²⁷ See *People v. Bird*, 60 Cal. 7; *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657, 662; *Perkins v. Eckert*, 55 Cal. 400, 405.

¹²⁸ In *re Calkins*, 112 Cal. 296, 306, 44 Pac. 577; *People v. Thompson*, 115 Cal. 160, 166, 46 Pac. 912; *People v. Smith*, 105 Cal. 676, 39 Pac. 38; *Garthe v. Hart*, 73 Cal. 541, 15 Pac. 93.

¹²⁹ 105 Cal. 676, 679, 39 Pac. 38.

the misleading quality of the instruction as the true ground for reversal. Thus, in *People v. Devine*,¹³⁰ the instruction complained of read thus: "One who finds lost property, under circumstances which gives him knowledge of or means of inquiry as to the true owner, and who appropriates such property to his own use, or the use of another person not entitled thereto, without making a reasonable and just effort to find the owner and restore the property to him, is guilty of larceny." Of this instruction the court said: "There is no evidence in this case of the finding of any lost property. The property was in the apparent possession of the appellant, who could not have intended to steal it, unless he knew it was not his own property. The objection to that instruction in this case is, that the jury may have construed the instruction to mean that if appellant had the property of another in his possession, and appropriated it to his own use, without making any effort to find the owner, and restore the property to him, he was guilty of larceny, although he may not have known or suspected it to be the property of another. In other words, if, by the exercise of due circumspection, he might have ascertained that some of the hogs in his possession belonged to some one else, he was as guilty as if he had known that they were the property of some one else." In such cases it is the duty of the court, if application therefor be made, to grant a new trial.¹³¹

But if the record disclose that the giving of an erroneous instruction, not applicable to the case, could not have affected the result, the error is immaterial.¹³² And in *Chisholm v. Keynauer*,¹³³ which was an action of slander for accusing the plaintiff of theft, there being no evidence that the plaintiff confessed to the theft, to the defendant, it was held that an instruction to the jury, that if they believed from the evidence that the plaintiff stated to the defendant that he had stolen the articles mentioned in plaintiff's complaint and that defend-

¹³⁰ 95 Cal. 227, 230, 30 Pac. 378. See, also, *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15, 26, 20 Pac. 28.

¹³¹ *Slaughter v. Fowler*, 44 Cal. 195.

¹³² *Satterlee v. Bless*, 36 Cal. 489. See, also, *Crossen v. Grandy* (Or.), 70 Pac. 906, holding that an instruction on subject of nominal damages held harmless where jury found actual damages.

¹³³ 110 Cal. 102, 42 Pac. 424.

ant without malice made the statements charged in pursuance of such belief, if he did make them, the plaintiff cannot be heard to complain, is improper as being inapplicable to the evidence, and, if given, must be deemed prejudicial to the plaintiff where the verdict of the jury and the judgment of the court were in favor of the defendant; and a new trial may properly be granted for error in the giving of such instruction.

The view taken in these cases, as to the effect of an inapplicable instruction may now be considered the established law in California.

§ 322. The court must not give erroneous instructions.

If the court assume the instruction of the jury, it must declare the law correctly. This is the most general of all rules, and includes all those deducible from the constitutional provision; and yet has sanction outside the constitution, and would be an important rule if there had been neither a constitutional or statutory provision on the subject.¹³⁴

But the giving of an instruction which incorrectly declares the law does not necessarily require a reversal or new trial. Where some portions of the instructions taken by themselves are objectionable, and yet these are subsequently qualified so that altogether they embrace a correct exposition of the law upon the points presented, there is no prejudicial error.¹³⁵ Nor is it reversible error to omit some of the proper conditions and limitations in some of the instructions, if these be contained in others, so that the instructions taken together properly present the law to the jury.¹³⁶

¹³⁴ Inaccuracy distinguishable from error: *Hill v. Finigan*, 77 Cal. 267, 11 Am. St. Rep. 279 and note, 19 Pac. 494.

¹³⁵ *People v. Dennis*, 39 Cal. 625. See, also, *Grijalva v. Southern Pac. Co.*, 137 Cal. 569, 70 Pac. 622. An erroneous instruction held cured by another and correct and favorable instruction: *People v. Rushing*, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742; *People v. Warren*, 130 Cal. 683, 63 Pac. 86.

¹³⁶ *People v. Armstrong*, 114 Cal. 570, 46 Pac. 611; *People v. Brittan*, 118 Cal. 409, 50 Pac. 664; *Turner v. Hearst*, 137 Cal. 232, 70 Pac. 18; *Lathrop v. Flood*, 135 Cal. 458, 67 Pac. 683; *Mitchell v. La Follett*, 38 Or. 178, 63 Pac. 54; *Elrod v. Ashton*, 14 S. Dak. 350, 85 N. W. 599; *Bockoven v. Board Supervisors*, 13 S. Dak. 317, 83 N.

It is not every instance, however, that error in instruction can be cured by matter in other instructions given at the same time. Where, for instance, in a criminal case, the evidence is such as specially calls for correct instructions upon the subject of controlling cause, of the crime alleged, the error in giving incorrect instructions is so prejudicial as not to be cured or neutralized by other instructions which are correct as to the elements of such crime.¹³⁷ Nevertheless, as a general rule, an instruction assuming to state a legal proposition must state its every element, having in view the nature of the case before the court. And it was held not error to refuse an instruction asked by a defendant "that any fact in favor of a defendant is sufficiently established when proven by a preponderance of evidence, and even though as to such fact the jury have some doubt, if it has been proven by a preponderance of evidence they must acquit," because it does not properly state the rule as to reasonable doubt upon the whole case.¹³⁸ Nor does the doctrine that an erroneous instruction is cured by one which is correct, apply where an instruction plainly states an incorrect principle of law.¹³⁹

Whether it be error for the court to read statutes and opinions of courts to the jury depends upon whether or not, the matter so read be applicable to the facts of the case. Certainly there can be no better objection to a correct charge when read from a printed page, than when read from manuscript, or delivered orally. The practice of reading decisions in other cases has been criticised, however, by the supreme court of California,¹⁴⁰ because perhaps of the difficulty of selecting language exactly adaptable to the particular case. But the same court has expressly decided that it is not error for the trial court,

W. 335; *Nelson v. Spears*, 16 Mont. 351, 40 Pac. 786; *Wilson v. West & Slade Mill Co.*, 28 Wash. 312, 68 Pac. 716.

¹³⁷ *People v. Williams*, 127 Cal. 212, 59 Pac. 581.

¹³⁸ *People v. Carroll*, 92 Cal. 568, 28 Pac. 600.

¹³⁹ *People v. Westlake*, 124 Cal. 462, 57 Pac. 465; *Green v. Southern Pac. Co.*, 122 Cal. 563, 55 Pac. 577.

¹⁴⁰ See *People v. McNabb*, 19 Cal. 919, 21 Pac. 843; *Cousins v. Partridge*, 79 Cal. 224, 21 Pac. 745.

in charging the jury, to quote from the decisions of courts in other cases, if the quotations correctly state the law.¹⁴¹

The instruction read in the case of *Etchepare v. Aguirre*,¹⁴² from a prior decision of the supreme court was criticised because of an omission of the context, but the case was not reversed, the court considering that, although it was not so clearly correct as could be desired, yet taken with the other instructions it was substantially so.

No good objection can be urged against the reading by courts, in charging juries, of applicable sections, or parts of sections from the codes and statutes of the state; and the practice of doing so has been permitted by the supreme court of California to pass without criticism.¹⁴³

An instruction whereby an attempt is made to state the law on a hypothesis favorable to a party, but which states it less favorably than he is entitled to have it stated is erroneous, and is as objectionable as one which states it positively and erroneously, and against him; because in addition to being erroneous, it is misleading. The case of *People v. Paulsell* ¹⁴⁴ is a good illustration of such an error. In its charge, to the jury upon the subject of circumstantial evidence the court instructed the jury that, "The doctrine of circumstantial evidence, in brief, is this, that all the circumstances must tend to establish the guilt of the defendant, and be inconsistent with any other rational hypothesis." The supreme court held this to be erroneous and misleading, and said: "All the circumstances taken together should establish the guilt of the defendant. They should do something more than tend to establish such guilt." And in *People v. Streuber*,¹⁴⁵ an instruction that "it is not incumbent upon the defendant to prove his innocence, nor is it incumbent on him to explain suspicious circumstances, unless they shall tend in some degree to explain his guilt" was held erroneous as a legal proposition, the supreme court saying: "This instruction does not

¹⁴¹ *Estate of Spencer*, 96 Cal. 448, 31 Pac. 453; *Cousins v. Partridge*, 79 Cal. 224, 21 Pac. 743.

¹⁴² 91 Cal. 288, 25 Am. St. Rep. 180, 27 Pac. 668.

¹⁴³ See *People v. Henderson*, 128 Cal. 465; *People v. Burns*, 63 Cal. 614.

¹⁴⁴ 115 Cal. 6, 13, 46 Pac. 734.

¹⁴⁵ 121 Cal. 431, 432, 53 Pac. 918.

contain a satisfactory statement of the law. We believe it may be said that in no case, except in those cases where the burden of proof shifts to the defendant, is it necessary or even incumbent on him to explain anything. He has the right to stand mute and demand that the people make the case against him beyond a reasonable doubt. However strongly incriminating circumstances of his guilt may come from the mouths of witnesses when testifying on the witness stand, it is a mere matter of choice upon his part, either to attempt an explanation of those circumstances or remain silent. No presumption against him is raised by the law, if he does not make the attempt to explain, and remains silent."

§ 323. Same test applied to modified as to other instructions.

The subject of the modification of instructions requires very little separate consideration. Formerly it was held in California that trial courts were limited in their right to modify or change instructions requested by the parties, to the correction of clerical errors and pruning the phraseology; that it was error if the sense were altered and the instruction then given, regardless of the question of the correctness of the instruction as given.¹⁴⁶ Naturally, so unsound a view was repudiated as soon as sound reasoning was applied to the subject matter. The contrary and more advanced view was first directly declared in *Boyce v. California Stage Co.*,¹⁴⁷ where Sanderson, J., citing and dissenting from previous decisions, said: "It is the duty and province of the judge to expound the law, and it is his right and privilege, in doing so, to select and make use of such language and illustration as, in his judgment, is best calculated to explain the same, and render it clear to the comprehension of the jury. Upon him the law imposes the duty, and he may determine the manner of its performance. Counsel may propose such instructions as their wisdom may suggest, and submit them to the judge; but beyond this, they have no legal right to dictate to the judge either the form or substance. If, in the opinion of the judge, such instructions

¹⁴⁶ *Russell v. Amador*, 3 Cal. 400; *Conrad v. Lindley*, 2 Cal. 173; *Jameson v. Quivey*, 5 Cal. 490.

¹⁴⁷ 25 Cal. 460, 471.

are defective in form or expression, or erroneous in law, he may, at his election, modify them in either particular, and give them to the jury in their modified form, or he may refuse to give them altogether. If error be assigned upon such instruction, the test question is not, Did the judge modify the instruction? On the contrary, the test is the same as in other cases, and is to be applied to the instruction in its modified form; and if it appear that the instruction as modified correctly states the law, no error has intervened. This court passes upon instructions, so far as they are given, in the form in which they were received by the jury; and the fact that they were prepared by counsel, and, before given, modified by the court, cannot be regarded as error per se, or as having any bearing whatever upon the question of error." This exposition has been ever since recognized as the law governing modifications of instructions; and while the court is not bound to modify and correct an erroneous instruction and may without error reject it, yet where the question arises on appeal or on motion for new trial whether error intervened at the trial, with reference to a modified instruction, the starting point is at the giving and not at the modifying of the instruction, and "if it appear that the instruction as modified correctly states the law, no error has intervened." The doctrine of the above case has been expressly approved in subsequent cases.¹⁴⁸

§ 324. The court must not give contradictory or inconsistent instructions.

This rule has in view the prevention of the jury being confused or misled. And where contradictory or inconsistent instructions are found, at least one of them must necessarily be erroneous, as well as confusing. If the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail, and it is equally impossible, after the verdict, to know that the jury was not influenced by that instruction which was erroneous, because the one or the other must necessarily be erroneous, where the two are repugnant. That such conflict is sufficient ground for reversal, has been

¹⁴⁸ See *People v. Dodge*, 30 Cal. 450; *People v. Williams*, 32 Cal. 288; *People v. Hall*, 94 Cal. 595, 600, 30 Pac. 7.

frequently held.¹⁴⁹ In *Dunlap v. New Zealand etc. Co.*,¹⁵⁰ the action was for a malicious prosecution. One instruction was to the effect that, in order to render the advice of counsel a defense to such action, the person relying upon the advice must show that after a full and careful statement of all such facts as were with due diligence obtainable, he was advised by counsel that a criminal offense had been committed. This instruction was erroneous because it was only the duty of the defendant to have stated the facts as he understood them without reference to diligence. There was another instruction bearing upon the advice of counsel as a defense which stated the law correctly. Nevertheless, because of the conflict the supreme court reversed the judgment, saying: "In this latter instruction the jury are told that it was a sufficient defense, if Borchers fully and fairly stated to the deputy district attorney the facts of the case as he understood them, while in the other instructions they were told that, in addition to such statements, it must be shown that he stated all the facts which could have been ascertained by due diligence. The jury must have been mis-

149 *Brown v. McAllister*, 39 Cal. 573, cited and approved in *Haight v. Vallet*, 89 Cal. 245, 249, 23 Am. St. Rep. 465, 26 Pac. 897; *People v. Wrenden*, 59 Cal. 392; *McCreery v. Everding*, 44 Cal. 246; *People v. Valencia*, 43 Cal. 552; *Chidester v. Con. P. D. Co.*, 53 Cal. 58; *Bank of Stockton v. Bliven*, 53 Cal. 708; *People v. Wong*, 54 Cal. 154; *Aguirre v. Alexander*, 58 Cal. 26; *People v. Pearne*, 118 Cal. 154, 50 Pac. 376; *Giffen v. Lewiston (City of) (Idaho)*, 55 Pac. 545; *Kennon v. Gilmer*, 5 Mont. 257; 51 Am. Rep. 45, 5 Pac. 847; *Kelly v. Cable Co.*, 7 Mont. 440, 14 Pac. 633, 13 Mont. 412, 34 Pac. 611; *Robinson v. Mills*, 25 Mont. 391, 65 Pac. 114; *Morrison v. McAtee*, 23 Or. 530, 32 Pac. 400; *Konold v. Rio Grande etc. Ry. Co.*, 21 Utah, 379, 60 Pac. 1021. For case of conflicting instructions which left the subject of insanity confused and confusing, see *People v. Fellows*, 122 Cal. 233, 54 Pac. 830. For case of contradictory instruction on subject of negligence, see *Lemasters v. Southern Pac. Co.*, 131 Cal. 105, 63 Pac. 128. It is not only the confusion in the minds of the jury which may result from inconsistent instructions which warrants a reversal, but the fact that it is impossible to determine which was adopted by them in reaching a verdict: *Sappenfield v. Main St. A. P. R. R. Co.*, 91 Cal. 48, 27 Pac. 590. The rule applies where conflicting rules are announced for fixing the amount of damages, and the judgment will be reversed in such case: *Harrison v. Spring Valley etc. Co.*, 65 Cal. 376, 4 Pac. 381.

150 109 Cal. 365, 42 Pac. 29.

led by these differing instructions and uncertain impressions which follow." In another case,¹⁵¹ where the court first took the question of undue influence in the execution of a will, from the jury by instructing them that they should find that the will was not obtained by undue influence, and then instructed them that the question of "undue influence, menace, duress, and fraud" in its execution was one submitted to them for their verdict, it was held that the fact that the two instructions taken together fairly submitted the case to the jury was no answer to the objection that the instructions were contradictory, because the contradiction had a tendency to confuse them in their deliberations.

But unless it be seen that the contradiction or inconsistency was such that confusion of the minds of the jury was a probable result, the foregoing rule does not hold good, because in considering this, as in considering other objections, the instructions must be considered in their entirety. The sentences or separate parts of a charge should be read in connection with the context, and the instructions as a whole, and, if when so read, it appears that the jury was correctly instructed, the judgment will not be reversed, because there is an apparent conflict between certain isolated sentences.¹⁵² And there is an important distinction between a mere literal inconsistency which a reasonable construction of the whole charge explains and a palpable contradiction which remains after all efforts to explain by construction have failed. In *Harrison v. Spring Valley etc. Co.*,¹⁵³ the court said: "The portion of the instruction excepted to was stated by the court to be an equivalent of the first sentence. But an instruction that the verdict should be

¹⁵¹ *Estate of Cunningham*, 52 Cal. 465.

¹⁵² *People v. Turcott*, 65 Cal. 126, 3 Pac. 461. See, also, *Witherby v. Thomas*, 55 Cal. 9. Where conflicting instructions are upon an immaterial point, and it is not reasonably apparent that the jury have been misled, a new trial will not be granted: *Robinson v. Mills*, 25 Mont. 391, 65 Pac. 114.

¹⁵³ 65 Cal. 376, 4 Pac. 381. See *People v. Leonard*, 106 Cal. 302, 39 Pac. 617, where it was held that certain instructions one with reference to what facts would constitute corporate existence, and another as to sufficiency of proof of a corporation *de facto* were not contradictory.

for the value of the crop at the time it was injured, with interest, is not substantially the same thing as an instruction that the verdict should be for the difference between the values immediately before and after the injury, with interest on that difference. The distinction between the first and last sentence of the instruction is radical—they are contradictory. It is urged the charge is to be read as a whole, and it is not necessary that a distinct instruction, much less a separate sentence, shall include all the qualifications or limitations upon the general rule laid down in it which the law requires, provided it appears the jury were given such qualifications or limitations elsewhere. But the cases cited in support of this proposition do not apply to the present case. Here two separate and irreconcilable rules for the conduct of the jury in fixing an amount of damages were given by the court. The contradictory rules were not harmonized by the declaration of the court that the one meant the same thing as the other.”

§ 325. Construction of instructions.

As the rules of construction are, to a limited extent, and more appropriately, discussed elsewhere, the subject is here deferred.¹⁵⁴ The same task of construction is imposed on the court upon review whether on appeal or motion for new trial. The most important rule is that a reasonable construction of instructions should be adopted.¹⁵⁵ And when all the issues are fully stated in some part of the charge, it is immaterial that they are not fully presented in the opening portion thereof.¹⁵⁶

¹⁵⁴ See post, § 325.

¹⁵⁵ *Bingham v. Lipman*, 40 Or. 363, 67 Pac. 98. See, also, *Wadhams v. Inman*, 38 Or. 143, 63 Pac. 11; *McCormick v. Queen of Sheba G. M. & M. Co.*, 23 Utah, 71, 63 Pac. 820; *Panger v. Old Nat. Bank*, 20 Wash. 618, 56 Pac. 391. Erroneous assumption held not cured by correct general charge: *Marti v. American S. & R. Co.*, 23 Utah, 52, 63 Pac. 184.

¹⁵⁶ *Hedlun v. Holy Terror Min. Co. (S. Dak.)*, 92 N. W. 31; *Gustafson v. Seattle Traction Co.*, 28 Wash. 227, 68 Pac. 721. Though an instruction that plaintiff's claim was subject to all offsets and defenses existing against his assignor, is objectionable, in not specifying that they must have existed before notice of the assignment, yet the charge as a whole not being misleading, it was held that the omission was not ground for reversal: *Farmers' & T. Nat. Bank v. Woodell*, 38 Or. 294, 61 Pac. 837, 65 Pac. 521.

§ 326. Exemptions and harmless invasions.

The present effort has been thus far directed to a discussion of the limitations upon the power of courts in charging juries. Since violations of such limitations are the only occasions for error, a consideration of the proper province of courts, except as has been incidentally necessary is obviously foreign to the present purpose. Some explanation, however, is proper of certain powers exercised by trial courts, some of which are exemptions from the constitutional inhibition and others remediless invasions of it. These will be discussed in the next three succeeding sections.

§ 327. The court may state the evidence, and state that there is evidence tending to prove certain facts.

Although the constitution forbids the judge, in his charge to the jury expressing an opinion upon the weight of the evidence, yet he may state the evidence to the jury, in addition to declaring the law applicable to the facts of the case, and where there is no evidence as to a particular fact or issue, he may so state to the jury. In *People v. King*,¹⁵⁷ the court said: "The constitutional provision referred to was intended to change the rule so as to leave the weight of the evidence entirely to the jury; but judges may still, as formerly, state what facts are in evidence and what are not; or in other words, they may state the evidence pro and con, in view of which the existence of certain facts is affirmed or denied, which includes the right to state to the jury that there is no evidence as to particular facts or issues, when such is the case." The court need not in all instances recite the evidence verbatim. Where it is referred to preliminarily as the basis for a distinct proposition the court may tell the jury that "evidence has been offered tending to show" so and so,¹⁵⁸ or state to the jury what the evidence tends to prove.¹⁵⁹

¹⁵⁷ 27 Cal. 507, 515, 87 Am. Dec. 95; *Morris v. Lachman*, 68 Cal. 109, 8 Pac. 799.

¹⁵⁸ *People v. Neary*, 104 Cal. 373, 37 Pac. 493; *Smithson v. Southern Pac. Co.*, 37 Or. 74; 60 Pac. 907. A correct statement by the court to the jury of the theory of the prosecution and of the defense of the defendant is not objectionable as a statement of facts: *People v. Worden*, 113 Cal. 569, 45 Pac. 844. As to how far the court may instruct with reference to facts claimed to constitute an agency, see *Belle City Mfg. Co. v. Kemp*, 27 Wash. 111, 67 Pac. 580.

¹⁵⁹ *People v. Cummings*, 113 Cal. 88, 45 Pac. 184.

But the court may not in the exercise of the function of stating the evidence, authorized by the constitution, state his impression of the substance and effect of it.¹⁶⁰ In *People v. Choynski*,¹⁶¹ the court explained how the instruction unfairly and erroneously assuming the effect of evidence, should have been framed. The trial court had given the following instruction: "But if this man is shown guilty of sending this letter with the motive imputed, he is guilty of this offense, and should be found guilty, no matter as to the consequences, whatever they may be." In reversing the judgment and ordering a new trial, the supreme court said: "This instruction is clearly erroneous, for, as we have seen, the letter which forms the foundation of the prosecution does not upon its face either convey a threat or imply a threat; and in addition to the elements of the offense included in this charge to the jury, as sufficient to justify a conviction, the court should have added, that it was not only necessary for the accused to have sent the letter, and have had the intent to extort, but the letter must have been such a writing as was adapted to imply a threat. That was a question of fact to be found in the affirmative by the jury before a verdict of guilty could be rendered under the law."

Notwithstanding this concession to the trial court, the recital of the evidence to the jury is a hazardous undertaking, which usually results in a reversal or a new trial. That the supreme court considers it a reprehensible practice, unnecessary and evil in its results is seen from what was said in *People v. Matthai*,¹⁶² as follows: "The court in instructing the jury should limit itself to a declaration of the principles of law necessary for their guidance in considering the evidence. It is as dangerous as it is unnecessary for the court to attempt to state the evidence. To state the evidence means to state it with fairness and exactness, and this is impracticable, unless all of the evidence in the case should be repeated. The attempt usually results, as it has in this case, in an instruction upon the facts, or upon the supposed facts, which is both argu-

¹⁶⁰ *People v. Gordon*, 88 Cal. 426, 26 Pac. 502.

¹⁶¹ 95 Cal. 640, 643, 30 Pac. 791.

¹⁶² 135 Cal. 442, 447, 67 Pac. 694.

mentative and unjust—argumentative, because the apparent opinion of the court as to the defendant's guilt can be seen thinly veiled; unjust, because of its assumption of matters either not proved, or at least in dispute—an assumption which eliminates any consideration of the evidence favorable to the defendant, and which, coming from the court, bears most heavily against him.” The charge which was the subject of this comment could scarcely have contained more vices.

§ 328. The court may state that a fact is proven or admitted as to which there is an admission or evidence without conflict, may state that a fact is not proven, in the absence of evidence, and may inform the jury that there is a conflict when such is the case.

The power to direct a verdict where there is no conflict,¹⁶³ includes the power to state to the jury that certain facts are proven if admitted or established by the contradicted evidence.¹⁶⁴ Nor will an instruction which assumes a fact as proved warrant a reversal, if the fact is admitted.¹⁶⁵

But the practice of stating facts proven by uncontradicted evidence is one not favored by the higher court. In *People v. Phillips*¹⁶⁶ the trial court had detailed to the jury certain facts of the case as having been proven, and of this the supreme court said: “Of course, this mode of charging the jury should be carefully avoided, but it has been held here that an instruction assuming a fact does not demand a reversal, if the fact

¹⁶³ See next section.

¹⁶⁴ See as to facts admitted by pleadings, *Tevis v. Hicks*, 41 Cal. 127; as to stating to jury what facts established by uncontradicted evidence: *Liverpool etc. Ins. Co. v. Southern Pac. Co.*, 125 Cal. 434, 441, 58 Pac. 55; *People v. Phillips*, 70 Cal. 68, 11 Pac. 493. An instruction assuming a fact cannot be prejudicial where the witnesses were unanimous in support of the same point: *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257, 286, 46 Am. St. Rep. 237, 39 Pac. 610.

¹⁶⁵ *People v. Phillips*, 70 Cal. 61, 11 Pac. 493; *People v. Messersmith*, 61 Cal. 246; *Watson v. Damon*, 54 Cal. 278. It is not error for the court, in its instructions to the jury, to speak of a witness as leading a dissolute life, where the evidence establishes, without conflict, that he does, and the fact is admitted by counsel in argument: *People v. Ross*, 115 Cal. 233, 46 Pac. 1059.

¹⁶⁶ 70 Cal. 68, 11 Pac. 493.

is admitted, or there is no shadow of conflict of evidence with respect to it.” And in *People v. Worthington*,¹⁶⁷ while holding the statement in an instruction that a certain defense, in support of which there was no evidence, was not in the case, was not reversible error, or necessarily ground for a new trial, the court remarked, concerning such instruction: “It is unfortunate that the statements of the judge found in this instruction as to the facts of the case should have gone to the jury.” Strictly speaking, such instances are invasions of the constitutional inhibition and therefore constitute error; but the error is disregarded as being immaterial, or without prejudice. So that practically the operation of the provision in the constitution is limited to matters of fact which are contested, or in some degree sought to be controverted by evidence.¹⁶⁸

The court may, also, in a proper case, state to the jury that there is no evidence in support of a given fact in controversy. Accordingly, it was held, in an action of trespass that the court could, without error, instruct the jury that no malice was proven, basing the same on the court’s own opinion of the insufficiency of the evidence.¹⁶⁹ Nor is it error, when such is the fact, for the court to state to the jury that a conflict of evidence exists.¹⁷⁰

§ 329. The court may direct a verdict in certain cases.

It is well established, in civil cases, that where there is no conflict in the evidence the constitutional inhibition does not apply, and the court may direct that a verdict be returned for the party entitled to it, as a matter of law.¹⁷¹ And it is held that a party is entitled to have the jury in-

¹⁶⁷ 115 Cal. 242, 46 Pac. 1061.

¹⁶⁸ *People v. Welch*, 49 Cal. 181.

¹⁶⁹ *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93; *People v. Steinberg*, 111 Cal. 3, 43 Pac. 198; *People v. Dick*, 34 Cal. 663; *People v. King*, 27 Cal. 507, 515, 87 Am. Dec. 95.

¹⁷⁰ *People v. Un Dong* 106 Cal. 83, 39 Pac. 12.

¹⁷¹ *O'Connor v. Witherby*, 111 Cal. 523, 44 Pac. 227; *Lacey v. Potter*, 103 Cal. 597, 37 Pac. 635; *Watkins v. Damon*, 54 Cal. 279; *Tompkins v. Mahoney*, 32 Cal. 231; *Robinson v. W. P. R. R. Co.*, 48 Cal. 424; *Bradley v. Lee*, 38 Cal. 366; *Miller v. Stewart*, 24 Cal. 505; *Pico v. Stevens*, 18 Cal. 378, 79 Am. Dec. 184; *Page v. Tucker*, 54 Cal. 121; *Martin v. Ward*, 69 Cal. 129, 132, 10 Pac. 276; *Chenery v.*

structed upon the law of the case made by his testimony, if it is not contradicted.¹⁷² But in *O'Connor v. Witherby*¹⁷³ the supreme court, while adhering to the rule that the court may in a proper case direct a verdict, remarked that such practice was hazardous and could only be sanctioned in the clearest cases. If the circumstances of the case indicate that upon another trial the evidence may be materially different the facts should be submitted to the jury in order that a new trial may be had.¹⁷⁴ And when the complaint is sufficient and the answers sets up a defense, by way of confession and avoidance, and there is evidence tending to support it, an instruction which directs the jury to find for the plaintiff without considering such defense is erroneous.¹⁷⁵ And although, where the evidence is all one way, and uncontradicted, the court may state to the jury that a defendant in a criminal case has shown no justification for the commission of the crime charged against him, yet such an instruction is not looked upon with favor; and the supreme court has in several cases criticised the practice of so instructing juries. The court in a late case remarked of an instruction that "there has been no evidence introduced in this case which tends, in the slightest degree, to show any justification of the crime alleged in the information," that it bordered dangerously upon matter of fact, and should not be given.¹⁷⁶

In either case, however, the decision of the trial court will be sustained, unless it clearly appears that its conclusion is wrong upon the facts.¹⁷⁷

Palmer, 6 Cal. 122, 65 Am. Dec. 493; *Watson v. Damon*, 54 Cal. 278. That directing verdict of acquittal on evidence is erroneous, but not reversible error: *People v. Roberts*, 114 Cal. 67, 45 Pac. 1016; *People v. Lewis*, 124 Cal. 551, 57 Pac. 470. As to directing verdict in favor of people in criminal case, where plea of autre fois acquit was interposed: See *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15.

¹⁷² *Sperry v. Spaulding*, 45 Cal. 544.

¹⁷³ 111 Cal. 523, 44 Pac. 227.

¹⁷⁴ *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635.

¹⁷⁵ *Heilbron v. Heinlin*, 72 Cal. 376, 14 Pac. 24. See, also, *Mattingly v. Roach*, 84 Cal. 207, 23 Pac. 1117.

¹⁷⁶ *People v. Shoedde* 126 Cal. 373, 58 Pac. 859; *People v. Plyler*, 126 Cal. 379, 58 Pac. 904.

¹⁷⁷ *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635; *O'Connor v. Wetherby*, 111 Cal. 523, 44 Pac. 227.

The nonenforcement of the constitutional inhibition in such cases is not because of its inapplicability, but because the infringement of it is immaterial.¹⁷⁸

§ 330. No review without exception taken.

A party has no opportunity to object to an instruction given to the jury until it is given, or to the denial of a request for an instruction until the refusal of the court to give it. All that he can do, and all that the law requires of him is to except. He is not expected to know what instructions the court will give until they are given, and therefore is not bound to previously except. But he must except before the jury retires, so as to call the attention of the court to the portions of the charge, or to the particular instructions excepted to and thus enable the court if it sees fit to withdraw the same or instruct the jury not to be governed by it, such being, theoretically at least, the main object and purpose of an exception.

What follows on this subject relates exclusively to civil cases. None of the law in California as to taking exceptions applies to criminal cases, and the same is true in a majority of the states.

No exceptions in a criminal case need be incorporated in a bill of exceptions. The law preserves exceptions to instructions as fully as though stated in terms in the record, and the defendant has the same advantage of every objection to an erroneous instruction, when properly authenticated in the judgment-roll, as when set out in a bill of exceptions, and formal objection made.¹⁷⁹

It is well settled that errors in giving or refusing instructions are "errors in law occurring at the trial," which must be excepted to or they cannot be reviewed, and "the exception must be taken at the time the decision is made."¹⁸⁰

¹⁷⁸ *Levitzky v. Canning*, 33 Cal. 299.

¹⁷⁹ *People v. Gibson*, 106 Cal. 458, 39 Pac. 864. Subject very fully explained in *People v. Thompson*, 115 Cal. 160, 46 Pac. 912.

¹⁸⁰ Cal. Code Civ. Proc., § 646; *Laver v. Hotaling*, 115 Cal. 613, 47 Pac. 593. See *Crossen v. Grandy* (Or.), 70 Pac. 906. As to proper form of exception to instruction see *Palmquist v. Mine & Smelter S. Co.* (Utah), 70 Pac. 994.

The requirement as to a timely exception rests upon the same reason as the requirement that there shall be an exception at all, and a party cannot avail himself of an error in giving an instruction to which he has not excepted in due time. After retirement of the jury it is too late to except.¹⁸¹ The codes and statutes seldom, if ever, fix the exact stage at which instructions shall be excepted to, but the necessities of the case, in view of what was stated above, require that they be taken between the delivery of the charge or reading of the instructions and the retirement of the jury.

The record must clearly show that exceptions were taken, and to what instructions, or portions of the charge, and if it does so show that is all that is required.

It is as essential that exceptions be preserved where errors in giving or refusing instructions are to be urged on motion for new trial as when on appeal. A party cannot take his chances for a verdict on instructions, given or refused without exception taken, and then, after verdict, except to the action of the court upon motion for a new trial. The rule, as well as the reasoning, is the same as where error in the admission of evidence is assigned.

In *Letter v. Pultney*¹⁸² there is a distinction in the matter of excepting between an oral charge of the court and a charge consisting of formal written instructions. While it has been held that it is sufficient to except "to each and all" of written instructions, exceptions to an oral charge must specify the portions objected to.¹⁸³ Where the court charged the jury orally

¹⁸¹ *Garoutte v. Williamson*, 108 Cal. 135, 141, 41 Pac. 35, 413; *Mallett v. Swain*, 58 Cal. 171; *Collier v. Corbett*, 15 Cal. 183; *Landauer v. Sioux Falls Imp. Co.*, 10 S. Dak. 205, 72 N. W. 467; *Boss v. Railway*, 2 N. Dak. 128, 33 Am. St. Rep. 756, 49 N. W. 655; *Frye v. Ferguson*, 6 S. Dak. 392, 61 N. W. 161. Under statutes requiring exceptions to be taken at the time the decision excepted to is made, it is held that exceptions to a charge of the court noted by the reporter out of court and in the absence of the opposing counsel, cannot be considered, though sanctioned by the court: *Ober v. Schenk*, 23 Utah 614, 65 Pac. 1073. See, also, *Sterrett v. Northport M. & S. Co. (Wash.)*, 70 Pac. 266, where exceptions were filed three days after charge to jury.

¹⁸² 7 Cal. 423.

¹⁸³ *Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414; *Rider v. Edgar*, 54

the exception was: "To each and every part and to the whole of said instructions the plaintiff duly excepted." The supreme court held the exception insufficient, and in discussing the exception said: "This was nothing more than an exception taken to the whole charge of the court without bringing to its attention any special point where error was claimed to have been committed."¹⁸⁴

Cal. 127; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103, note; Sill v. Reese, 47 Cal. 318, 348; St John v. Kidd, 26 Cal. 263; Robinson v. W. P. R. R. Co., 48 Cal. 425; Brown v. Kentfield, 50 Cal. 132. Exceptions taken simply by reference to the number of each paragraph of instructions held insufficient in Palmquist v. Mine etc. Co. (Utah), 70 Pac. 994. Exceptions held too general in Wilson v. Sioux Consol. Min. Co., 16 Utah, 392, 52 Pac. 626; McAlister v. Long, 33 Or. 368, 54 Pac. 194; Robins v. Paulson (Wash.), 70 Pac. 1113; Rush v. Spokane Falls & N. Ry. Co., 23 Wash. 501, 63 Pac. 500.

¹⁸⁴ Cockrill v. Hill, 76 Cal. 195, 18 Pac. 318. Original exception to each and all the instructions given by the court of its own motion is not sufficient to authorize a review of the instructions so given: Cavallaro v. Texas etc. Ry. Co., 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918, and cases cited. It seems to have been held in one case that it is not necessary to except specifically, by number or otherwise, to instruction given, and that it was sufficient if the exception be "to all" the instructions given, etc.: Sukeforth v. Lord, 87 Cal. 407, 25 Pac. 497. But that case turned on the point whether, upon the record, it appeared that the party had excepted to all; and it would not be sufficient, under later decisions to follow it. At any rate, if one instruction given for the opposite party, or by the court of its own motion were correct, or if the refusal of one of those requested by the complaining party was proper, such a general form of exception would be of no value. In Frost v. Grizzly Bluff C. Co., 102 Cal. 525, 527, 36 Pac. 629, the exception was in these words: "We except to the instructions the court gave for the plaintiff, to such as he refused to give for defendant, to such as he modified, and such as the court gave of its own motion." The supreme court in affirming the judgment said: "It would not be contended that all of the instructions given by the court of its own motion are erroneous; and the parts thereof considered erroneous should have been specifically pointed out, in the absence of a stipulation by respective counsel waiving all but a general exception." See, also, Rogers v. Mahoney, 62 Cal. 613; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103, note; Sill v. Reese, 47 Cal. 294; Rider v. Edgar, 54 Cal. 127; Shea v. Potrero etc. R. R. Co., 44 Cal. 414; Brown v. Kentfield, 50 Cal. 129; Robinson v. Western Pac. R. R. Co., 48 Cal. 409. In Cavallaro v. Texas etc. Ry. Co., 110 Cal. 348, 358, 52 Am. St. Rep. 94, 42

Where defendant's counsel excepted "to that part of the charge about probable cause" reciting the first sentence employed by the court in treating of the subject, it was held that the portion of the charge objected to was sufficiently specified.¹⁸⁵

An exception was in the words, "Be it also remembered that defendant duly excepted, and now excepts to the following portions of the charge given to the jury by the court on its own motion, and insists that the action of the court in giving said portions of said charge was contrary to law." Then followed that portion of the charge which included the part excepted to by the appellant. The exception was held sufficient.¹⁸⁶

Pac. 918, the trial court had, upon its own motion, instructed the jury at considerable length. The only exception to the instructions thus given was as follows: Counsel for defendant said: "We desire, if your honor please, to save an exception to each, every, and all the instructions given by the court of its own motion." It was objected on appeal, on the part of respondent, that this exception was not sufficiently specific to warrant the court in scrutinizing the instructions given by the court upon its own motion. The court, affirming the judgment, said: "It is objected, on the part of respondent, that this objection is not sufficiently specific to warrant this court in scrutinizing the instructions given by the court upon its own motion. The current of authority seems to render it imperative that we sustain the objection of respondent, and decline to examine and pass upon the legality of the court's instructions. The theory of the ruling is, that exceptions to the charge of a court to the jury ought to point out specifically the portions excepted to, and be made at the time of trial, in order that the judge may have an opportunity, before the jury retires, to correct any error he may have inadvertently fallen into in drawing up the charge in the hurry and perplexities of the trial: *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103, and note; *Sill v. Reese*, 47 Cal. 294; *Rider v. Edgar* 54 Cal. 127; *Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414; *Brown v. Kentfield*, 50 Cal. 129; *Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409; *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497. The doctrine of these cases and of others of like import, have established a rule of practice in this state from which we do not feel at liberty to depart. This rule, of course, has no application to the special instructions asked by the parties and given or refused by the court, concerning which a general exception has always been held sufficient."

¹⁸⁵ *Rogers v. Mahoney*, 62 Cal. 611.

¹⁸⁶ *Wales v. Pacific Elec. Motor Co.*, 130 Cal. 521, 524, 62 Pac. 932, 1120. Where an instruction which is given, is correct for the

In the case of *Bernstein v. Downs*¹⁸⁷ it was expressly held that a general exception "to the instructions asked for and allowed by the court on the part of the plaintiff" was insufficient, and that it was necessary that there should be at least a particular exception to each of the instructions, by number, or other designation. McFarland, J., delivering the opinion, covered the whole subject fully and declared the law as subsequently followed and as it now stands, in the following language: "Appellant contends that some of the instructions given to the jury were erroneous. They mostly involve those general features of the case which are noticed in other parts of this opinion; but the preliminary objection of respondent, that there are no sufficient specifications of the particulars in which they are alleged to be erroneous, must be sustained. The only exception shown in the record on the subject is the following statement by counsel for the defendant: 'We except to the instructions asked for and allowed by the court on the part of the plaintiff.' This, upon its face, certainly does not 'specify the particular upon which the party will rely' within the meaning of the code. It does not specify any particular error. There are some decisions of this court founded on an expression in the opinion rendered in *Robinson v. Western Pac. R. R. Co.*,¹⁸⁸ in which more liberality is shown to exceptions to instructions given at the request of a party than to instructions given by the court on its own motion; but taken altogether they do not condone the extreme generality of the exceptions in the case at bar. There certainly should be at least an exception to each of the instructions by number or other designation; otherwise the attention of the court is not called to any one particular alleged error (citing authority). The latest notice of the subject by this court to which our attention has been called was in *Joyce v. White*,¹⁸⁹ in which it seems to have been held that an exception in these words, 'The court erred in giving to

most part, but contains a vice which cannot be separated from the balance without materially affecting its meaning, a general exception to it is sufficient: *Haun v. Rio Grande & W. Ry. Co.*, 22 Utah, 346, 62 Pac. 908.

¹⁸⁷ 112 Cal. 197, 205, 44 Pac. 357.

¹⁸⁸ 48 Cal. 425.

¹⁸⁹ 95 Cal. 236, 239, 30 Pac. 524.

the jury instructions asked by plaintiff,' was not sufficient. Certainly, such an exception as the one at bar would be insufficient if any part of the instructions excepted to en masse is free from error." In the still later case of *Gray v. Eschen*¹⁹⁰ the whole subject of what is and what is not sufficient exception, both to instructions or charge of the court and to instructions given upon request of parties, was discussed, and prior decision requiring portions of the court's instructions to which it is desired to except to be identified so as to specifically direct attention to them were approved; and the latest preceding decision (*Bernstein v. Downs*) with reference to what constitutes sufficient exception to instructions given at request of parties was considered, quoted from and approved. The subject was discussed at such length, though entirely to the points involved, as to forbid insertion here of even the most pertinent portions, but its perusal is recommended to those having doubts as to the proper practice herein, and reference is here made to that case, and to the declarations of the true rules of practice therein recommended. Such reference is made, notwithstanding the later decision of *Williams v. Casebeer*,¹⁹¹ where, in an opinion written by Commissioner Chipman, the following is found: "The exception taken to the instruction given at the request of the plaintiffs was as follows: 'To all of which instructions defendant duly excepted.' Respondents make the point that the exception was insufficient because it was general. The rule relied upon applies only to the charge of the judge, and does not apply to the special instructions asked by the parties and given or refused by the court, concerning which a general exception is sufficient." This is done for the following reasons: 1. In the last case, the conclusion above quoted was merely preliminary to part of the reasons for affirmance of the judgment; 2. No authority was cited except *Cavallaro v. Texas etc. Ry. Co.*, which does not sustain said conclusion; 3. Though the supreme court should hereafter stand by the decision in *Williams v. Casebeer*, still exceptions taken as suggested in *Gray v. Eschen* are well taken and will insure a review of the instructions thus excepted to.

¹⁹⁰ 125 Cal. 1, 5, 57 Pac. 664.

¹⁹¹ 126 Cal. 77, 86, 58 Pac. 380.

One exception is certainly sufficient to cover any number of legal propositions contained in the same instruction, to which a party desires to object. In *Shea v. Potrero etc. R. R. Co.*¹⁹² the court said: "The plaintiff makes the point that as the exception went to the whole instruction, and as the instruction contains several propositions, some of which are law, the exception is of no avail. The plaintiff's objection cannot be sustained. It has been the constant practice of this court to entertain an exception to an instruction given at the request of one of the parties, though it be composed of several legal propositions."

§ 331. Cure and waiver of error, and question of whether harmless or prejudicial.

Following the plan heretofore adopted, the discussions of all important questions touching the waiver and cure of error in giving instructions, and involving questions as to whether erroneous given instructions are harmless or prejudicial are here postponed and are elsewhere considered, except as their consideration was incidentally necessary in this subdivision.¹⁹³

¹⁹² 44 Cal. 414, 429.

¹⁹³ See ante, § 315.

CHAPTER 17.

ERRORS IN RULING ON MOTION FOR NONSUIT.

- § 332. Ruling on motion, a decision on a question of law.
- § 333. Two methods of review.
- § 334. When and how plaintiff's choice between new trial and direct appeal governed by circumstances.
- § 335. Question of how motion should be decided, not here involved.
- § 336. Dismissal and voluntary nonsuit.
- § 337. Compulsory or involuntary nonsuit—General rule
- § 338. How right affected by defendant's pleading.
- § 339. Variance as a ground.
- § 340. Test of materiality of variance—Statutory provisions.
- § 341. Variance by proof showing absence of interest in plaintiff.
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- § 344. Variance resulting from nonjoinder.
- § 345. Fatal variance not aided by findings.
- § 346. Grounds for, must be specified.
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- § 350. How plaintiff's evidence considered on motion.
- § 351. Same rules apply whether trial by court or jury.
- § 352. Of the judgment to which defendant entitled.
- § 353. How error in ruling cured or waived.
- § 354. Exception to ruling on motion.

§ 332. Ruling on motion a decision on a question of law.

In all jurisdictions it is recognized that cases may sometimes be in some form withdrawn from the jury and reserved for the sole consideration and determination of the court. The only difference which exists is one of method by which the conceded end shall be reached. In California and in many other states

it is by nonsuit, while in others the object is attained by means of the cumbersome and somewhat complicated machinery of a demurrer to evidence. In both cases, the same end is attained; and the one remedy as well as the other can be applied only where the plaintiff shall have failed to make out a case which the law says is proper to be submitted to a jury.

In several states the practice is to move for a directed verdict, in cases tried by jury.¹ Nor in any state is the remedy by motion for nonsuit exclusive. But if the plaintiff sees fit to go to the jury, or to submit the case to the court on insufficient evidence, he will be precluded from bringing another action for the same cause, and where both parties move for the direction of a verdict, and there is evidence to sustain the verdict as directed, the decision of the court will not be reviewed, though the evidence is conflicting.² Formerly, it seems to have been an unsettled question whether the decision on motion for nonsuit was a decision on matter of law or of fact. But it was finally settled in *Cravens v. Dewey*³ that a decision on the question raised by motion for nonsuit was of a legal question

¹ An involuntary nonsuit is unknown to the Arizona practice, the proper practice being to instruct the jury to find for the defendant: *Roberts v. Smith* (Ariz.), 52 Pac. 1120. The practice of directing a verdict for the defendant in lieu of nonsuit is common in North Dakota and South Dakota. The motion for a directed verdict, like that for nonsuit must state the grounds: See *Sanford v. Elevator Co.*, 2 N. Dak. 6, 48 N. W. 434; *Bowman v. Eppinger*, 1 N. Dak. 21, 44 N. W. 1000; *Tanderup v. Hansen*, 8 S. Dak. 375, 66 N. W. 1073; *Knight v. Towels*, 6 S. Dak. 575, 62 N. W. 964; *Alt v. Railway Co.*, 5 S. Dak. 20, 57 N. W. 1126. Refusal to direct a verdict in a proper case is an error of law. *Sanford v. Elevator Co.*, 2 N. Dak. 6, 48 N. W. 434, *Bowman v. Eppinger*, 1 N. Dak. 21, 44 N. W. 1000; *Pine v. Gillitt*, 2 N. Dak. 255, 50 N. W. 710. See, also, *First Nat. Bank v. North* holding that section 4659 of the compiled laws of South Dakota does not interfere with the right of the court to direct a verdict.

² See *Church v. Foley* 10 S. Dak. 74, 71 N. W. 759; *New England etc. Co. v. Great Western etc. Co.*, 6 N. Dak. 407, 71 N. W. 130; *Stanford v. McGill*, 6 N. Dak. 536, 72 N. W. 938; *Huber v. Miller*, 41 Or. 103, 68 Pac. 400; *Stayer v. Troy Laundry Co.*, 41 Or. 141, 68 Pac. 405.

³ 13 Cal. 41, 43. Where there is substantial conflict in the evidence, it is error to withdraw an issue of fact from the jury: *McRea v. Hillsboro Nat. Bank*, 6 N. Dak. 353, 70 N. W. 813.

purely, the court, per Baldwin, J., saying: "The second error assigned is in granting a nonsuit. A preliminary objection is taken that no motion for a new trial was made. Nor is any necessary, the granting of the nonsuit on the facts being a pure question of law, which is properly raised on the record for review by exception taken." Being an error of law occurring at the trial, an erroneous ruling on the motion is ground for a new trial.⁴

§ 333. Two methods of review.

In order to obtain a review of error committed in granting or denying a motion for nonsuit no motion for new trial is necessary. Such review may be had on appeal from the judgment with a bill of exceptions. But where a party thinks he has any grounds for new trial the decision upon which cannot be so reviewed, the more convenient course is to include the specification of error in the ruling and urge it on motion for nonsuit. In *Donohue v. Galavan*⁵ the question was raised by plaintiffs (appellants), that inasmuch as the defendants had moved for a new trial below and had simply specified among errors in law that, "The court erred in granting defendants' motion for nonsuit, and in granting a nonsuit," this was not sufficient specification of the grounds of the motion within the Practice Act, section 195, the same in this respect as the existing code provision on the subject. But the supreme court held the objection not well taken, and in disposing of the point reasoned thus: "The question presented on a motion for a nonsuit is a question of law, and in the statement on new trial the decision of the motion should be specified as an error of law. Were this not the correct practice, the party complaining of the granting of a nonsuit would be compelled, after stating the evidence, to restate it in his specifications, in order to show that it was insufficient to justify the decision—or in other words, that it was sufficient to make a *prima facie* case to go to the jury."

⁴ *Ernst v. Fox*, 26 Wash. 526, 67 Pac. 258; *Venable v. Randall*, 113 Ga. 1042, 39 S. E. 470.

⁵ 43 Cal. 573, 576.

§ 334. When and how plaintiff's choice between new trial and direct appeal governed by circumstances.

From a plaintiff's standpoint there may be errors of which a correction is desired in addition to, or resulting in, that which he thinks were errors committed in granting a nonsuit. In the latter case the plaintiff need not await a motion by defendant. If, however, the evidence offered by him on a vital point has been ruled out so that he can see that a nonsuit against him is inevitable, he must, in order to enjoy the benefit of exceptions to rulings on evidence, either await defendant's motion or obtain leave of court to take a voluntary nonsuit with the privilege of subsequently moving to set it aside. Upon a denial of the latter motion he may move for a new trial, or take a direct appeal upon a bill of exceptions. In *Natoma Water Co. v. Clarkin*⁶ the court said: "The point that the nonsuit, being taken by consent, excludes the consideration of the exceptions, is untenable. The liberty reserved to move to set the same aside conserved to the plaintiffs all their rights. The course pursued in this case is often adopted, when it is evident from the rulings of the court that the plaintiff cannot recover, and a motion for nonsuit is not made by the adverse party." The circumstances in *Whipley v. Dewey*⁷ were such that the only course left to the plaintiff, after having taken a voluntary nonsuit with leave to move to set it aside, was to move for a new trial. But the supreme court in deciding the point presented to it did not advert to the circumstances as distinguishing it from the prior case of *Natoma Water etc. Co. v. Clarkin*.⁸ The neglect of the court so to do left these cases in apparent conflict, the former case reviewing the ruling specified as error in law made during the trial on appeal, and the latter case using language so general as to imply that no ruling during the trial in case of voluntary nonsuit can be reviewed unless plaintiff proceeds for a new trial. And this has led to some confusion in subsequent decisions. There is, however, no difficulty if the nature of the rulings relied upon as error be properly distinguished. Where the plaintiff relies upon a ruling which

⁶ 14 Cal. 544, 549.

⁷ 17 Cal. 314.

⁸ 14 Cal. 544.

may be reviewed on appeal from the judgment with a bill of exceptions, he may take a direct appeal from the order refusing to set aside the nonsuit; but where the supposed grievance can only be shown by affidavits, and cannot for that reason be considered on appeal from the judgment (as in *Whipley v. Dewey*), he should, of course, proceed for a new trial and appeal from an adverse order on his motion for a new trial. It is well to read the general language of some of the subsequent opinions of supreme court justices in the light of this qualification. In such case the case is taken out of the rule that a voluntary nonsuit, being a consent order, is not appealable. The liberty reserved to move to set the nonsuit aside preserves to the plaintiff all his rights.⁹

§ 335. Question of how motion should be decided not here involved.

It is beyond the scope of this work to discuss what will justify granting, and what will warrant denial, of nonsuit. The determination of the principal legal proposition involved in considering the question often involves other propositions of law, and gives rise to a wide field of argument and investigation. Here we have to do only with the procedure or practice for correction of any error which may be committed in passing on the motion. Nevertheless, some of the general principles governing herein require to be stated incidentally for a full understanding of the practice.¹⁰

§ 336. Dismissal and voluntary nonsuit.

Dismissal of actions and nonsuits, both voluntary and involuntary, are provided for in the California Code of Civil Procedure, reading as follows: "An action may be dismissed, or a judgment of nonsuit entered, in the following cases: 1. By the plaintiff himself, by written request to the clerk, filed among the papers in the case, at any time before trial, upon payment of costs; provided, a counterclaim has not been made, or affirmative relief sought by the cross-complaint or answer of the defendant. If a provisional remedy has been allowed, the un-

⁹ *Natoma Water etc. Co. v. Clarkin*, 14 Cal. 544, 549.

¹⁰ See succeeding sections of this chapter.

dertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon; 2. By either party upon the written consent of the other; 3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal; 4. By the court, when, upon the trial and before the final submission of the case, the plaintiff abandons it; 5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury; 6. By the court, when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months.”¹¹ So reads the section in its present form. It has been amended from time to time, but as the applicability of no decision is affected by any amendment, it is deemed unnecessary to trace the changes effected by amendment. Prior to the Practice Act of 1851, there was no statutory provision in California on the subject of nonsuit.

Practically, there is no difference in legal effect between a dismissal of an action before trial and a voluntary nonsuit at the trial. The cases in which and the terms upon which an action may be dismissed without action of the court as well where there may be a dismissal, on motion of plaintiff, before the court, that is, a nonsuit, are provided for in the foregoing section of the Code of Civil Procedure. The effect of an application of plaintiff for nonsuit at the trial after introducing his evidence, and the duty of the court upon such application being made, were explained in *Hancock Ditch Co. v. Bradford*,¹² where the error assigned was that the trial court had refused to permit the plaintiff to take a nonsuit after the testimony for plaintiff and defendant was closed. The decision turned upon a question as to the point in the proceedings at which the trial should be considered as closed, and the court held that by the term “trial,” as used in the Practice Act, was meant the determination or finding in the case. In rendering this decision, the court stated that it was in consonance with the common-law rule on the subject of nonsuit, which the court

¹¹ Cal. Code Civ. Proc., § 581.

¹² 13 Cal. 637.

held the statute not to have altered.¹³ But by reference to later cases it will be seen that the court either did not correctly interpret the statute, or did not correctly understand the common-law rule. In subsequent decisions by the same court it has been held that the plaintiff cannot take a voluntary nonsuit after submission of the case to the jury. In *Brown v. Harter*¹⁴ the court criticised the prior decision, and held that the Practice Act did not give an arbitrary right to become nonsuit after the case had been submitted to the jury, but that it existed at any time before such final submission and the retirement of the jury. The rule thus stated has been subsequently recognized as correct.

§ 337. Compulsory or involuntary nonsuit—General rule.

Plaintiff must prove each and every essential fact necessary to support the allegations of the complaint. He may be nonsuited for failure to prove a negative allegation. Thus in an action to recover money paid on a false account presented to plaintiff under threat of publishing matter calculated to injure plaintiff's credit, it was held that plaintiff, in order to obviate a nonsuit, was bound to show a want of consideration for the money so paid.¹⁵ But where, in an action on a verbal contract, the complaint alleged several distinct promises on the part of the defendants, which were denied by the answer, and on the trial the plaintiff introduced no proof except as to one of the promises, it was held that this was not ground for a nonsuit, that the provision of the statute required a relaxation of the common-law rule respecting variances, and that it being apparent that the defendants were not surprised or prejudiced by the failure of proof, the error in stating the agreement should have been disregarded.¹⁶

¹³ Citing Chitty's General Practice, 910.

¹⁴ 18 Cal. 76.

¹⁵ *Kohler v. Wells*, 26 Cal. 606.

¹⁶ *Peters v. Foss*, 20 Cal. 587, 591. See, also, *McIntyre v. Troutner*, 63 Cal. 429, where the variance claimed was that the complaint alleged plaintiff to be a subcontractor, whereas the proof showed him to be an original contractor. The variance held immaterial. In the first case above, the court said: "The conditions on behalf of the plaintiff are admitted, except in one particular; and the difference

§ 338. How right affected by defendant's pleading.

Some important changes were made by amendment to the Code of Civil Procedure, with reference to the extent to which plaintiff's right to a voluntary nonsuit might be affected by the character of the pleading filed by the defendant, subsequent to its adoption. The simple limitation of the Practice Act upon the right of plaintiff, by which plaintiff was denied the right to take a voluntary nonsuit only where the defendant had set up a counterclaim, was embodied without change in the code as first adopted. The limitation was interpreted strictly. It was held in *Mayle v. Porter*,¹⁷ where the cause of action set forth in the complaint was that the defendants claimed an estate or interest in the premises of which the plaintiff averred himself to be in the possession, and the "subject of the action was the adverse claim, estate or interest," set up by the defendants, and where the answer merely stated the facts essential to a complaint in ejectment against the plaintiff, and demanded that the possession of the premises be awarded to the defendants, that this was neither the statement of a cause of action arising out of the transaction set forth in the complaint, nor one connected with the subject of the action, within the sense of section 438 of the Code of Civil Procedure as it then stood, and that the answer did not therefore amount to a counterclaim; and finally that the motion of the plaintiff to dismiss the action should have been granted. And soon afterward, in *James v. Centers*¹⁸ a dismissal had been entered by the clerk at the instance of plaintiff, and judgment of dismissal entered thereon which was afterward set aside on motion of defendants. From the order

between the agreement alleged and that admitted, so far as these conditions are concerned, would seem to be immaterial: There is no pretense of any failure to perform, nor of any variance between the pleadings and the proof, and the most that can be said is, that the agreement as admitted in the answer differs to some extent from the agreement as stated in the complaint. As there is no question of performance, however, we think the difference is not such as entitled the defendants to a nonsuit for it is evident that they could not have been taken by surprise, and the rule in case of variance does not apply."

¹⁷ 51 Cal. 639, 640.

¹⁸ 53 Cal. 31, 32.

vacating the judgment plaintiff appealed. It was urged in support of the order that the pleading filed by the defendants constituted cross-bills. But the supreme court held "(1) that the judgment of dismissal in the form entered by the clerk was properly entered, inasmuch as no counterclaim had been made; (2) that the matters set forth in the cross-bills, so called, did not constitute a counterclaim, because not arising out of the transaction set forth in the complaint, and not connected with the subject of the action; (4) that the order setting aside the judgment was erroneous, because the plaintiff had the right to dismiss the action in the absence of a counterclaim." Subsequently to these decisions, the limitation on the right of dismissal was enlarged by amendment so as to read as now found in section 581.

§ 339. Variance as a ground.

One of the established grounds for nonsuit is variance between the allegations of the complaint and the proofs. Where the plaintiff, though failing to make proof in strict accordance with his allegations, yet proves a case belonging to the same class or character of actions, the variance is not fatal. He may amend the complaint to make it correspond with the proofs, and if there be no objection on the part of the defendant by motion for nonsuit or to evidence, a decision in plaintiff's favor cures the variance, or rather renders it immaterial. The California Code of Civil Procedure, as shown above, mitigates the strictness of the common law as to variance; but still a variance may be such as to be incapable of being cured by amendment or waived.

The consequences of a variance between the averments in a pleading and the proof are the same under the code system of practice as at common law, except that they may be, to a great extent, obviated by amendments to the pleadings, which are allowed with great liberality.¹⁹

Of course, when the plaintiff, suing on one cause of action, proves one essentially different from that declared on, the defendant is entitled to a nonsuit on the ground of variance.²⁰

In cases of absolute variance between the pleading and proof,

¹⁹ *Stout v. Coffin*, 28 Cal. 65, 67.

²⁰ *Johnson v. Moss*, 45 Cal. 515; *Stout v. Coffin*, 28 Cal. 65, 67.

the defendant may either object to the evidence, or move for a nonsuit; but he is not precluded from moving for a nonsuit by reason of his failure to object to the admissibility of evidence, or by introducing evidence. In *Elmore v. Elmore*,²¹ the court said: "Respondent contends that appellant waived the point of variance between the complaint and the evidence, because having made that point in a motion for a nonsuit, he afterward introduced evidence in the case. This position, however, is not tenable. Appellant moved for a nonsuit upon the express ground that there was no evidence tending to prove that appellant held certain lands and property which he had with the separate money of the deceased wife as her trustee; and the motion for a nonsuit should have been granted. The point thus made on the motion for a nonsuit was not waived by the mere fact that the appellant afterward introduced some evidence in the case. No such rule obtains in this state. The rule upon the subject is simply this, that if, after a motion for a nonsuit for want of testimony upon any material point has been erroneously overruled, the defendant proceeds and supplies the defect by evidence which he himself introduces, then the error committed in overruling the nonsuit is cured. But if the motion for a nonsuit should have been granted, and no evi-

²¹ 114 Cal. 516, 519, 46 Pac. 458. The rule as stated in the above case is that stated in other cases by the same court. In *Smith v. Compton*, 6 Cal. 25, the court, after saying that it was necessary to make certain proof, in order to sustain the plaintiff's case said: "This was not done in the opening, and the defendant was entitled to a judgment of nonsuit. The defendant, however, after his motion was denied, introduced evidence which enabled plaintiff to supply the defect in his case, and by so doing waived the objection." In *Winans v. Hardenbergh*, 8 Cal. 293, the court said: "The only exception taken by appellant in the court below was to the refusal to instruct the jury as in cases of nonsuit upon the close of plaintiff's testimony. If this were an error it was cured by the introduction of evidence on the part of defendants which supplied every omission in plaintiff's case, and conclusively established his right to recover." In *Abbey Homestead Assn. v. Willard*, 48 Cal. 614, the court said: "The motion for a nonsuit should have been granted. The answer denies that the defendant ever ousted or ejected the plaintiff from the premises, and the plaintiff failed to prove the ouster; but the defendant afterward supplied the defect by proving that he had remained in possession ever since the execution of the lease above mentioned. The production of that evidence cured the error."

dence is afterward introduced by the defendant which changes the status of the case, then he can avail himself of the error committed in the refusing of the nonsuit. . . . By the motion for nonsuit the appellant distinctly raised the point insisted on here, and thereby called the attention of both court and counsel to it; and, therefore, he is not within the rule frequently announced here that a party will not be allowed to raise an objection in this court for the first time. And, as he introduced no evidence tending to supply any omission in the evidence of the respondent, the motion for a nonsuit occupies the same position now as it did in the court below when made there. The motion for a nonsuit was the proper method by which to raise the said question of variance."

§ 340. Test of materiality of variance—Statutory provisions.

The test of the materiality of a variance—in other words, of the question whether a failure to demur or object to evidence constitutes a waiver of variance between allegation and proof so that it cannot be subsequently urged—is whether the opposite party has been misled by it. This is the test fixed in the California Code of Civil Procedure, reading as follows: "Sec. 469. No variance between the allegation in a pleading and proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleadings to be amended, upon such terms as may be just.

"Sec. 470. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

"Sec. 471. Where, however, the allegation of the claim or defense to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof." Other important provisions having an important bearing upon the questions of nonsuit and variance are found in section 475 of the California Code of Civil Procedure, as amended from time to time, which also covers many other matters of practice, and, in addition, prescribes far-reaching rules of decision.

§ 341. Variance by proof showing absence of interest in plaintiff.

Where an action is brought in the name of a party shown by the proof to have no interest in the cause of action, so that to bring in the real party in interest would not amount to a joinder of another party in interest with plaintiff, but the substitution of one party for another, it is clear that the variance cannot be obviated by amendment, and is fatal. In a case of this character the supreme court said: "But there is a more serious obstacle in the case, which completely bars the way, and which we cannot overlook without willfully closing our eyes. The judgment, as already stated, declares a trust, as to the one-third of the Rancho San Vincente, in favor of the estate of Juan Maria, deceased, and yet not only was the estate not before the court, but, according to the complaint, the first step had not been taken to procure the appointment of a representative of the estate. It is an anomaly in practice, to render judgment in favor of a party who is not before the court, and is not represented in any manner in the action. It will be no answer to say that the adjudication will inure to the benefit of the plaintiff. If the plaintiff would collect his debt out of the estate, the first step is to procure the appointment of an administrator, and the administrator will pay the debt, if it is a valid claim, in the due course of administration; but when he is appointed he cannot avail himself of this judgment, for as to it he is neither party nor privy."²² In *Christian College v. Hendley*,²³ the facts, as well as the view of the court, appear in the following portion of the opinion: "But there was a variance between the contract declared upon and that proved at the trial. The complaint alleges a promise to the corporation plaintiffs, and the promise proved was to the 'finance committee, to be elected hereafter by the Christian Church of Santa Rosa.' If it be true, as insisted by the plaintiff, that on the formation of the corporation all the property and funds of the proposed college vested by operation of law in the corporation, the facts should have been stated in the complaint, so that it might appear on its face that though

²² *Bachman v. Sepulveda*, 39 Cal. 689.

²³ 49 Cal. 347, 350.

the promise was made to the committee, the right of action had passed by operation of law to the plaintiff. But the averment of a promise to the corporation is not supported by proof of a promise to the finance committee. The objection to the admission in evidence of the subscription, as the pleadings now are, should have been sustained."

On the same principle, it is held that there can be no recovery upon a joint contract where the complaint sets up a several contract alone.²⁴

§ 342. Variance in actions *ex contractu*.

Evidence to support an *indebitatus assumpsit* will not support a cause of action grounded upon an express contract. Thus, where the declaration was upon a note, and there was but one count, and the court found that the note was never given, but that there was an indebtedness due from the defendant to the plaintiff for merchandise, it was held that the finding was against the averment, and could not support the judgment.²⁵ So where the plaintiff sued as assignee of an attorney for services performed for two defendants jointly, and the answer admitted the services, but one of the defendants pleaded a special agreement for the services, under which plaintiff was to be paid, alleging that he had been paid accordingly, it was held that the burden of proof was upon the defendants and that neither of them was entitled to a judgment of nonsuit on motion.²⁶

In another case,²⁷ plaintiff alleged that the defendant was indebted to him for a balance due on "a mutual open or current account" for personal property sold and delivered by plaintiff to the defendant. The findings of the trial court and the view taken by the supreme court on the point that there was a

²⁴ *Stearns v. Martin*, 4 Cal. 228, 230.

²⁵ *Lewis v. Meyers*, 3 Cal. 475. It is a cardinal rule that the pleading of the party to whom relief is granted must be sufficient to warrant the relief: *Sigourney v. Zellerbach*, 55 Cal. 431. See, also, *Lake v. Tebbitts*, 56 Cal. 481.

²⁶ *Shain v. Forbes*, 82 Cal. 577, 582, 23 Pac. 198. But see *Gilman v. Bootz*, 63 Cal. 120.

²⁷ *Hopkins v. Orcutt*, 51 Cal. 537.

fatal variance appear from the opinion. The complaint contained but the one count, and plaintiff sought at the trial recovery for money due on a special contract pertaining to a separate transaction, and the trial court had included it in its findings and covered it in the judgment which the supreme court reversed, saying: "The balance due for the improvements was under a special contract, and did not constitute an item in the mutual, open, running account, nor did the parties so treat it, under the complaint as framed. The plaintiff was not entitled to recover this item."

Where a plaintiff alleges a transaction with the defendant to consist of one entire agreement, and the proof shows a sale including an agreement by defendant to execute and deliver a subsequent written undertaking, or guaranty, not alleged in the complaint, there is a fatal variance and he is not entitled to judgment. Such was the case of *Johnson v. Moss*,²⁸ where the court said: "As against the plaintiff, the complaint must be presumed to state correctly the terms of the contract. When, therefore, the plaintiff proved by his own testimony that he bought the right of way of the defendant's ferry, and that the defendant was to give him a written guaranty that 'there should be no more ferry there,' he proved a contract essentially different from the one declared on, and for that reason the motion for nonsuit should have been granted."

§ 343. Variance by proof contradicting negative allegations.

A plaintiff cannot, having stated facts for recovery upon one theory, recover upon another theory, negatived by the allegations of his complaint. Accordingly, in *Gregory v. Haworth*²⁹ the court, after explaining the allegations, and pointing out certain inconsistencies in the complaint, said: "Thus, in view of the doctrine that a pleading must be construed most strictly against the pleader, the complaint, so far as it proceeds upon the theory that Haworth held the stock as collateral security for the payment of the fifteen hundred dollars due from Bartol, becomes *felo de se*; and the matter thus far alleged only amounts, in logical effect, to an aver-

²⁸ 45 Cal. 515, 517.

²⁹ 25 Cal. 654, 656.

ment that Bartol was the owner of the stock, and while so the owner assigned it to Haworth in fraud of his creditors; yet the case seems to have been tried upon the theory that a pledge was averred and the plaintiff allowed to recover a judgment upon a finding of facts which at the outset he declared to be pretended and false. This cannot be allowed without a gross violation of the rule which requires that the allegations of the complaint, the evidence, and the findings, should correspond in legal intent. The averment, the proof, and the findings, should harmonize and proceed upon the same theory, each pointing with logical distinctness to the same result. A recovery, if had, must be *secundum allegata*, and must be grounded upon the facts which are averred in the complaint, and not upon those which are denied."

§ 344. Variance resulting from nonjoinder.

Obviously, there can be no recovery against a party not before the court; nor can the complaint be so amended as to make him a party unless he be shown to have a connection with the subject matter of the action. Where the agreement sued on was proven to have been made between Richard Morrison and Bradley Berdon & Co., and the allegations were that the agreement was with Bradley Berdon & Co., a corporation, made through its agent it was held that the judgment against Bradley Berdon & Co., a corporation, must be reversed, the court saying: "It is evident that he cannot recover against the corporation, as the contract was not made by it."⁸⁰ And where the plaintiff alleged that the note sued on was signed by one McKinley and one Campbell, and, to sustain the allegation, offered in evidence a note signed by H. B. McKinley and C. Campbell & Co., the court held the variance to be in important and substantial particulars, and therefore fatal.⁸¹

§ 345. Fatal variance not aided by findings.

While the allegation of an essential fact which is merely defective in form or in matters of detail will support a finding of such fact, yet no amount or character of evidence will

⁸⁰ Morrison v. Bradley, 5 Cal. 503, 504.

⁸¹ Cotes v. Campbell, 3 Cal. 192.

justify a finding of such fact in the entire absence of an allegation. In *Hicks v. Murray*,³² where the judgment had been given in favor of a defendant upon his cross-complaint, which omitted to allege one of the essentials to the acquisition of a mechanic's lien, to wit, that the claim contained the name of the owner, or reputed owner, the court, in reversing the judgment, said: "It is true that we can see that the statement itself is not defective in the particular of ownership—but this will not aid the pleading upon the point. By the tenth section of the act the pleadings in such cases as this are required to be the same as in other cases. It has so often been determined that unless the facts essential to the support of the case be alleged upon the record, evidence upon such omitted facts cannot be heard or considered, that a citation of authority upon the point is unnecessary. Evidence of facts, or stipulations as to facts of a case, cannot make the case broader than it appears by allegation, nor can a party by mere force of facts admitted or proven become entitled to relief to which he would not have been entitled had his case been resisted only by general demurrer interposed to the pleadings upon which he relies." And in *Mondran v. Goux*,³³ where there was a variance between the complaint and the finding, the court, in reversing a judgment entered upon such finding, and after pointing out the variance, said: "In other words, the cause of action, if any, established by the findings is wholly different from that averred in the complaint, and is foreign to any issue raised by the pleadings. The rule is well settled that a plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other which may be developed by the proofs."

§ 346. Grounds for must be specified.

When a party moves for a nonsuit, the grounds of the motion must be precisely stated, and no other grounds than those stated can be considered by the court in granting or denying the motion.³⁴

³² 43 Cal. 515, 522.

³³ 51 Cal. 151, 153.

³⁴ *Shain v. Forbes*, 82 Cal. 577, 582, 23 Pac. 198; *Coffey v. Greenfield*, 62 Cal. 602; *Gardiner v. Schmaelzle*, 47 Cal. 588; *Raimond v.*

A motion for nonsuit, as has been previously explained, performs the same office as a demurrer to evidence, which was the original form of procedure to reach a failure of proof. A demurrer to evidence is simply an objection to the sufficiency of evidence, and is subject to the same requirement as to certainty and definiteness. The motion for nonsuit, being little more than a new name for the former procedure, is also required to be specific, and must call the attention of the court and plaintiff to the particular defects in the proof upon which the defendant relies, so that if the defects so pointed out be remediable, plaintiff may improve the opportunity of doing so, by the introduction of further evidence, or by amendment of his complaint, or both.³⁵

And here, as where objections are made to evidence offered during the trial, the movant is confined to the grounds specified in his motion; he cannot specify one ground and subsequently urge another, or others. This rule was recognized and given effect in one of the earliest California cases, in an action to recover the value of gold-dust, claimed to have been lost in

Eldridge, 43 Cal. 506; Idaho Mercantile Co. v. Kalanquin (Idaho), 62 Pac. 925; Howie v. Bratrud, 14 S. Dak. 648, 86 N. W. 747; Frank v. Bullion B. & C. Min. Co., 19 Utah, 35, 56 Pac. 419; Wild v. Union Pac. R. Co., 23 Utah 265, 63 Pac. 886; White v. Rio Grande W. Ry. Co., 22 Utah, 138, 61 Pac. 568; Lewis v. Silver King Min. Co., 22 Utah, 51, 61 Pac. 860. A specification in the motion that "plaintiff has shown by his own evidence that he has no right of recovery in this action," was held properly overruled as being too vague and uncertain to be entitled to consideration: Givens v. Keeney (Idaho), 63 Pac. 110. And such motion on the ground of contributory negligence of plaintiff, which fails to state or show any particulars wherein the evidence shows contributory negligence, is insufficient, and should be overruled: Skeen v. Oregon Short-Line R. Co., 22 Utah, 413, 62 Pac. 1020. The general principle that the party moving for nonsuit will be strictly limited to the grounds specified in his motion, has been often declared: See Gardiner v. Schmaelzle, 47 Cal. 588; Palmer v. Marysville etc. Co., 90 Cal. 168, 27 Pac. 21, where the order was reversed, although another ground existed, which might have warranted the order, but was not specified: Belcher v. Murphy, 81 Cal. 39, 22 Pac. 264, to same effect.

³⁵ Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Kiler v. Kimball, 10 Cal. 267; Silva v. Holland, 74 Cal. 530, 16 Pac. 385; Flynn v. Dougherty, 91 Cal. 669, 27 Pac. 1080; Coffey v. Greenfield, 62 Cal. 602; People v. Barnard, 27 Cal. 470; Shain v. Forbes, 82 Cal. 577, 23 Pac. 198.

the inn of the defendant, where the plaintiff was a guest. The defendant moved for a nonsuit "on the ground that the plaintiff had not proved by competent testimony the loss of any property of definite value." That was the only ground specified, and the supreme court refused to review the propriety of the refusal to nonsuit the plaintiff on an additional ground, that the plaintiff did not show himself to have been a guest in the house, saying: "This being the only position taken in support of the motion, unless that be tenable, the nonsuit was properly refused, notwithstanding there may have been other good and sufficient reasons, for which, if urged at the proper time, it might have been demanded. A party making his motion on one ground thereby impliedly waives all others. He cannot avail himself of a different position, on appeal, from that which he assumed in the court below. This doctrine is well established, and is necessary to be sustained, in order that the plaintiff may not be misled in the course of the trial, and in the settlement of his bill of exceptions in case the nonsuit should be ordered."³⁶ In *Coffey v. Greenfield*,³⁷ the defendant, at the

³⁶ *Mateer v. Brown*, 1 Cal. 221, 222, 223, 52 Am. Dec. 303. To same effect, *Kiler v. Kimball*, 10 Cal. 267; *McGarrity v. Byington*, 12 Cal. 429; *People v. Barnard*, 27 Cal. 470; *Sanchez v. Neary*, 41 Cal. 487, *Coffey v. Greenfield*, 62 Cal. 609, ground of motion too general; *Loring v. Stuart*, 79 Cal. 200, 21 Pac. 651; *Miller v. Luco*, 80 Cal. 257, 261, 22 Pac. 195; *Quimby v. Boyd*, 8 Colo. 197, 6 Pac. 462. Same ruling and further that objections to insufficiency of pleading waived if not included in grounds of motion; *Mattoon v. Fremont etc. Co.*, 6 S. Dak. 198, 60 N. W. 740, applying rule to motion to direct verdict on ground that "evidence does not preponderate for plaintiff; *Brown v. Warren*, 16 Nev. 239, holding that no ground will be considered on appeal other than those stated at trial; *State v. Tamler*, 19 Or. 533, 25 Pac. 71, applying rule to directing acquittal in criminal case. When plaintiff's case incurable, general grounds sufficient; *Daley v. Russ*, 86 Cal. 117, 24 Pac. 867. See note to *French v. Smith*, 24 Am. Dec. 624. In *State v. Tamler*, *supra*, the court said: "If counsel for defendants relied upon the grounds urged here for asking the court below to direct an acquittal of his clients, he should have so stated and thereby given the court an opportunity to have passed upon them; and if the ruling was against him, preserve the same on the record so we could be advised thereof. It is very possible that the grounds upon which the appellant now contends the motion should have been granted, might have been obviated at the trial had they been stated. We are not advised from the record what reason, if

close of plaintiff's evidence, moved for a nonsuit, on the general ground that "there was no evidence to sustain the action" without specifying wherein there was a lack of evidence. On appeal the supreme court said: "The motion was properly denied. It is settled law in this state that a party moving for a nonsuit should state in his motion precisely the grounds on which he relies, so that the attention of the court and opposite counsel may be particularly directed to the supposed defects in the plaintiff's case."

any, was assigned in the court below why this motion should have been allowed nor what question the court actually did decide. We have repeatedly held that error is never presumed, but must be made to affirmatively appear, and in a case of this kind the motion should direct the attention of the court and opposite counsel to the precise point made and the grounds thereof." After reviewing authorities, the court continued thus: "These rules have their foundation in a due regard to the fair administration of justice, which requires that when an error is supposed to have been committed, there should be an opportunity to correct it at once before it has had any consequences. The law should not permit a party to make a general motion, as in this case, and lie by without having the particular grounds of this motion made known to the court, and take the chances of success on the grounds which the judge may think proper to put his ruling, and then if he fails to succeed with either court or jury avail himself of an objection, which if it had been stated might have been removed. This works no injustice to a party, for if there be merit in his motion or objection he has the full benefit of it and if there be no merit he certainly ought not to succeed. In the midst of a trial *at nisi prius* the judge is necessarily compelled to rule upon many questions of law without the opportunity of deliberating the importance of the question demanded, and it is but an act of justice to him that such rulings be not reversed, unless his mind was specifically drawn to the point upon which the reversal was asked and acted upon as deliberately as time and circumstances would admit." To same effect, *Schile v. Brokhahus*, 80 N. Y. 620. In *Edwards v. Carr*, 13 Gray, 238, Shaw, C. J., says: "It is very important that no objection to a verdict be brought before this court by an exception which was not in some form taken at the trial, especially in a case where there is ground to believe that if it had been brought to the attention of the judge and adverse counsel, it might have been avoided by an amendment or by a more specific direction by the judge sustaining or overruling it. The party objecting would have the full benefit of his objection in matter of law, if well founded, either by a ruling in his favor or by an allowance of the exception, and the rights of both parties be secured."

It is well settled that the supreme court will not look into the evidence to see whether the action of the lower court in denying a nonsuit was tenable, where the motion does not specify the grounds.³⁸ In *Silva v. Holland*³⁹ the record recited that: "Defendants have moved for a nonsuit, which, after argument, was denied by the court, and the defendants excepted," and, in affirming the action of the lower court denying the motion, the supreme court remarked that for that reason alone, if for no other, the motion was properly denied.

It is equally well settled that if a nonsuit be granted below upon a specified objection not well taken, the order will be set aside on appeal, without investigation of other alleged defects in the evidence which might support the order. In *Sanchez v. Neary*⁴⁰ the grounds of the motion as shown by the transcript were: First, that the plaintiff had failed to show the title to the demanded premises to be in himself; second, that he had failed to show that said premises were included in any of the deeds offered in evidence, or in the grant or patent to the person from whom he deraigned title. The deed from the latter to plaintiff's immediate grantor had been admitted in evidence without having been objected to on the ground that it did not include the premises in controversy, and there was nothing in the record to show that the attention of the court or counsel was called to the point relied upon on appeal, to wit, that the particular deed did not include the particular lot involved in the action. The supreme court held that, inasmuch as it did not affirmatively appear from the specifications for nonsuit that the deed did not include the lot in controversy, and as sufficient appeared on the face of the deed to raise a presumption that it included the premises described in the complaint, it would look no further, and reversed the order.

§ 347. Specifications required where nonsuit on opening statement.

The same rule applies where a nonsuit has been granted on an

³⁸ *Flynn v. Dougherty*, 91 Cal. 669, 671, 27 Pac. 1080; *Silva v. Holland*, 74 Cal. 530, 16 Pac. 385.

³⁹ 74 Cal. 530, 531, 16 Pac. 385.

⁴⁰ 41 Cal. 485, 487. See, also, *Raimond v. Eldridge*, 43 Cal. 506, 508.

opening statement of plaintiff's counsel; and, unless the defects are pointed out in the case stated in the opening statement, the motion should not be granted. In *Raimond v. Eldridge*⁴¹ the court said: "In his opening the plaintiff failed to state any title or right of possession in himself, and if the motion for nonsuit had been made on this ground, it ought to have been granted. But the defendant did not see fit to rely on this as a ground for nonsuit. If he had, the court might have permitted the plaintiff to amend his statement and cure the defect. Having omitted to rely upon this ground of nonsuit in the court below, he will not be allowed to raise the question for the first time here. We can only review the action of the court on the defendant's motion as he made it; and I think the court erred in granting the motion on the grounds stated."

§ 348. Degree of particularity required in specifying.

It would seem that, by analogy to the rules governing specifications of the insufficiency of evidence, the same degree of particularity as there required would be required on motion for nonsuit. But it was held in one case⁴² that a statement of the grounds of the motion, that the plaintiff had failed to prove a single allegation of his complaint, were sufficiently precise and definite to sustain an order granting a nonsuit. The court reasoned that from this it would be understood that plaintiff had not proved a single material allegation of the complaint. From this case it would appear that a somewhat different rule applies on appeal where the court has granted the motion from that applicable where the motion is denied and the defendant appeals, the latter being held to the strict rule as to specifications, while, where the nonsuit is granted, the presumption against error comes to the defendant's aid. In the case just noticed the court said: "The plaintiffs' attorney, no doubt, understood what was meant by the statement made by the attorney for the defendants, viz., that the plaintiff had not proved a single material allegation of the complaint. We cannot say that the nonsuit was erroneously granted, for the reason that the grounds on which it was asked were not stated with the precision and definiteness that the law required."

⁴¹ 43 Cal. 506, 508.

⁴² *Carter v. Hopkins*, 79 Cal. 82, 21 Pac. 549.

§ 349. When rule as to specification of grounds does not apply.

At any rate, the rule requiring specifications extends no further than the reason for it, and does not apply where the plaintiff's case could not be cured, even if attention had been called to its defects by a specification of the grounds of the motion. In *Daley v. Ross*,⁴³ where the complaint alleged a contract, and the proof was of a contract so different that the complaint could not be so amended as to cover it, the court said: "The plaintiff's idea that it was for the defendants to set up the excuse for nonperformance of the contract is without foundation. It results that the evidence does not prove the case made by the complaint. It is objected, however, that the defendants did not specify this as a ground of their motion for nonsuit. It is undoubtedly a settled rule that a motion for nonsuit should specify the grounds upon which it is made, and ordinarily a ground which is not stated cannot be considered. But the reason of the rule is to afford an opportunity to correct such defects as admit of correction. It is plain that this reason does not apply where the defects do not admit of correction. As to such cases, the rule does not apply. Or, if the phrase be preferred, where the defects cannot be corrected, the error in not specifying the grounds of the motion is immaterial."

§ 350. How plaintiff's evidence considered on motion.

A nonsuit should not be granted if there is evidence tending to prove all the material allegations of the complaint.⁴⁴ Or, as

⁴³ 86 Cal. 114, 117, 24 Pac. 867, citing cases.

⁴⁴ *McKee v. Greene*, 31 Cal. 418. See, also, *Felton v. Millard*, 81 Cal. 540, 21 Pac. 533; 22 Pac. 750; *Higgins v. Ragsdale*, 83 Cal. 219, 23 Pac. 316; *Idaho Mercantile Co. v. Kalanquin (Idaho)*, 62 Pac. 925; *Cummings v. Helena etc. R. Co.*, 26 Mont. 434, 68 Pac. 852; *Cameron v. Kenyon, Connell etc. Co.*, 22 Mont. 312, 74 Am. St. Rep. 602, 56 Pac. 358; *Rosenbaum v. Hayes*, 8 N. Dak. 469, 79 N. W. 987; *Chaperon v. Portland Elec. Co.*, 41 Or. 39, 67 Pac. 928; *Huber v. Miller*, 41 Or. 103, 68 Pac. 400; *Baines v. Coos Bay Nav. Co.*, 41 Or. 135, 68 Pac. 397; *Bohl v. Dell Rapids (City of)*, 15 S. Dak. 619, 91 N. W. 315; *Yankton Ins. Co. v. Railway*, 7 S. Dak. 428, 64 Nev. 514; *Grigsby v. Western Union Tel. Co.*, 5 S. Dak. 561, 59 N. W. 734. And similarly the evidence of the opposite party must be presumed to be true, and if ruled against, the party making the mo-

has been otherwise expressed, the motion should be denied if the plaintiff has made out a *prima facie* case, and there is no material variance between the averments and the proof.⁴⁵

Motion for nonsuit, by analogy to demurrer, admits the truth of testimony introduced, but challenges its legal sufficiency.⁴⁶ It not only admits the literal truth of plaintiff's evidence, but admits every inference of fact which can properly be drawn therefrom. It has the same effect in presenting a question of law as would a general demurrer to a complaint alleging only the same facts.⁴⁷ Nor, in deciding the motion, can the court

tion cannot object, on appeal that it was a question of fact and not of law: *Grigsby v. Tel. Co.* 5 S. Dak. 561, 59 N. W. 734; *Marshall v. Harney Peak Min. Co.*, 1 S. Dak. 350, 47 N. W. 290. It was held that where plaintiff's evidence proved the correctness of the defendant's contention as to the state of the accounts a nonsuit was warranted: *Burraston v. First Nat. Bank*, 22 Utah, 328, 62 Pac. 425. If there is evidence which should go to the jury on the material issues of the case (*Alvarado v. De Celis*, 54 Cal. 588), or if the evidence and presumptions reasonably arising therefrom tend to prove the facts in controversy (*De Ro v. Cordes*, 4 Cal. 117), a nonsuit is improper. If in an action to recover real estate plaintiff's evidence shows a right of recovery of any portion of the tract sued for, a nonsuit as to the whole tract is improper: *Wright v. Reseberry*, 81 Cal. 87, 22 Pac. 336; also, where plaintiff's evidence shows he is entitled to at least nominal damages: *Treadway v. James*, 57 Cal. 137; *Hancock v. Hubbell*, 71 Cal. 537, 12 Pac. 618. If there be a substantial conflict in the evidence upon a material issue, a nonsuit should not be granted: *Simpson v. Appelgate*, 67 Cal. 471, 8 Pac. 39. But in passing upon the motion the court cannot consider anything as evidence for plaintiff, which has not been, in fact, put in evidence; and where the ground of motion was that it appeared that the note sued on was secured by mortgage, which had not been foreclosed, it was held that the fact that the action had been amended by attachment based upon an affidavit of plaintiff, that the security had become worthless could not be considered in aid of plaintiff's case, the affidavit not having been put in evidence, nor the worthlessness of the security otherwise proven: *Brophy v. Downey*, 26 Mont. 252, 67 Pac. 312.

⁴⁵ *Chapman v. Neary*, 115 Cal. 79, 46 Pac. 867.

⁴⁶ *Butler v. Hyland*, 89 Cal. 575, 26 Pac. 1108. See, also, *Warren v. McGill*, 103 Cal. 153, 37 Pac. 144; *Dow v. G. & C. M. Co.*, 31 Cal. 650; holding that on the motion, every fact must be accepted as proven which the evidence tends to prove.

⁴⁷ *Warner v. Darrow*, 91 Cal. 309, 27 Pac. 737; *Goldstone v. Merchants' etc. Co.*, 123 Cal. 625, 56 Pac. 776.

properly consider any errors committed in the admission of evidence. Full effect must be given to evidence, though erroneously admitted against objection, if it be not irrelevant or without force.⁴⁸

A nonsuit should not be granted when there is any evidence tending to sustain plaintiff's case, without passing upon its sufficiency.⁴⁹ And the evidence should be interpreted most strongly against the defendant.⁵⁰ So, if there be a conflict in plaintiff's evidence, and some of it tends to sustain plaintiff's case, a nonsuit should not be granted.⁵¹

§ 351. Same rules apply whether trial by court or jury.

The rules as to nonsuit are the same, and are to be similarly applied, when the trial is by the court as when it is by a jury.⁵² The general rule on the subject was thus stated in *Downing v. Murray*:⁵³ "With a jury present, the judge should grant a nonsuit where a verdict in favor of plaintiff should be set aside for want of evidence to support it, and, in the absence of the jury, where the evidence is insufficient to support a judgment for plaintiff."

⁴⁸ *Wright v. Roseberry*, 81 Cal. 87, 22 Pac. 336; *O'Connor v. Hooper*, 102 Cal. 528, 36 Pac. 939. In the second case the court said: "Defendant's motion for nonsuit was not made on the ground that the evidence which had been admitted did not substantially tend to prove all the facts essential to plaintiff's cause of action, but only on the same grounds upon which portions of the admitted evidence had been objected to when offered, and to the admission of which defendant duly excepted; so that the exception to the order denying the nonsuit added nothing to the exceptions before taken to the admission of the evidence, and does not raise the question whether the admitted evidence tended to prove all the material allegations of the complaint; and, since errors in admitting evidence cannot be reviewed on a motion for nonsuit, it follows that the nonsuit was properly denied."

⁴⁹ *Zilmer v. Gerichten*, 111 Cal. 73, 43 Pac. 408.

⁵⁰ *Goldstone v. Merchants' etc. Co.*, 123 Cal. 625, 56 Pac. 776.

⁵¹ *Pacific L. Ins. Co. v. Fisher*, 109 Cal. 566, 42 Pac. 154. See, also, *Wasserman v. Sloss*, 117 Cal. 425, 59 Am. St. Rep. 209, 49 Pac. 566, holding that the question of variance between the testimony of the plaintiff and that of one of his witnesses could not be considered on the motion.

⁵² *Goldstone v. Merchants' etc. Co.*, 123 Cal. 625, 56 Pac. 776.

⁵³ 113 Cal. 455, 463, 45 Pac. 869.

§ 352. Of the judgment to which defendant entitled.

Whether the plaintiff take a voluntary nonsuit or be nonsuited on motion of defendant, the judgment should be of nonsuit and dismissal, and not on the merits.⁵⁴ But where a motion for nonsuit was made at the close of plaintiff's evidence, with the understanding that neither party had any further evidence to offer, and that, if the nonsuit should be granted, judgment should go for the defendants, otherwise, for the plaintiff, and the motion was denied, and the court made findings and gave judgment for the plaintiff, defendant not applying for leave to introduce any evidence, it was held the judgment should be affirmed.⁵⁵

On the same principle as that above stated, where a cause has been submitted upon the merits by both parties, the plaintiff, as well as the defendant, has a right to a final judgment upon the merits.⁵⁶ And where there are cross-complaints filed by defendants, the court cannot, on nonsuiting the plaintiff, dismiss the cross-complaints.⁵⁷

⁵⁴ *Wood v. Ramond*, 42 Cal. 643. Nonsuit constitutes no estoppel: *Jacob v. Day*, 111 Cal. 571, 44 Pac. 243.

⁵⁵ *Tuller v. Arnold*, 98 Cal. 522, 33 Pac. 445. If a verdict is directed in favor of defendant, it precludes another action for the same cause which is not the case where a motion is allowed to take the case from the jury for insufficiency of plaintiff's evidence: *Huber v. Miller*, 41 Or. 103, 68 Pac. 400.

⁵⁶ *San Jose Ranch Co. v. San Jose Land etc. Co.*, 126 Cal. 322, 324, 58 Pac. 824.

⁵⁷ *Taylor v. Bartholomew (Idaho)*, 56 Pac. 325. To same effect *Warner v. Darrow*, 91 Cal. 309, 312, 27 Pac. 737. In the second case above the court clearly explained the proper practice in such case as follows: "The nonsuit of plaintiff, upon motion of defendant, did not operate as a dismissal of the action, so as to prevent the trial of the issues arising upon the cross-complaint and the answer thereto. The effect of this order was, that plaintiff was entitled to no relief against the defendant on account of matters alleged in the complaint, but the issues made by the cross-complaint, and the answer thereto still remained, and the appellant was entitled to have them tried and disposed of. This was, in effect, so held in *Mott v. Mott*, 28 Cal. 419. The case of *Wood v. Ramond*, 42 Cal. 644, upon which respondent relies, is not in conflict with this view. In that case there was no cross-complaint, and what was there said about an order of nonsuit being, in effect, a dismissal of the action does not apply here."

§ 353. How error in ruling cured or waived.

The error in refusing a motion for nonsuit is not cured by the subsequent verdict of the jury in favor of the plaintiff.⁵⁸ But it has been held in several cases that, if the motion be made at the close of plaintiff's case, in order to be available as ground for error it must be renewed at the close of the case.⁵⁹ And it is cured if, after the ruling, the defendant introduces evidence which supplies the defect in plaintiff's evidence.⁶⁰ In such case, if the defendant fails to stand upon an adverse ruling on the motion, and other evidence is thereafter introduced which supplies the defects in plaintiff's case, such evidence inures to plaintiff's benefit, and cures the defect, so that it cannot be urged as a ground for new trial.⁶¹

Mere defectiveness of allegation must be distinguished from total absence of allegation, and variances between the proof of details are immaterial if there be no essential conflict between such proof and the finding. In such case, the variance is waived by failure to object to evidence at the trial and to point out the variance. Thus, in *Paul v. Silver*,⁶² where the com-

⁵⁸ *McGraw v. Friend*, 120 Cal. 574, 52 Pac. 1004. In this case the court said: "It is said by counsel for respondent that the question of negligence has been submitted to a jury, and that the court should be bound by their conclusion. But the motion for a nonsuit was addressed to the court, and presented a question of law for it to decide, and in deciding that question the court erred; and the subsequent decision of the jury could not cure that error."

⁵⁹ *Bowman v. Eppinger*, 1 N. Dak. 21, 44 N. W. 1000; *Ilstad v. Anderson*, 2 N. Dak. 167, 49 N. W. 659; *Brace v. Van Eps*, 12 S. Dak. 191, 80 N. W. 197; *First Nat. Bank v. Red River Nat. Bank*, 9 N. Dak. 319, 83 N. W. 221.

⁶⁰ *Russell v. Pacific Can Co.*, 116 Cal. 527, 48 Pac. 616; ante, §§ 332-334.

⁶¹ *Power v. Stocking*, 26 Mont. 478, 68 Pac. 857. When after plaintiff has introduced evidence to prove some of this allegations of the complaint the court clearly intimates that he cannot recover, he is not bound to introduce evidence to sustain other allegations, unless so advised by the court: *Bundage v. Mellon*, 5 N. Dak. 72, 63 N. W. 209. The right of a defendant to have all the issues of fact submitted to the jury is not waived by his motion to direct a verdict, unless the plaintiff also asks a directed verdict: *Wilson v. Commercial etc. Co.*, 15 S. Dak. 322, 89 N. W. 649.

⁶² 16 Cal. 74, 76.

plaint designated a point in the boundary of the tract of land involved in the suit as the "northeasterly" corner, and the proof showed it to be the northwesterly corner, it was held insufficient to warrant a reversal of the judgment, the other and more definite marks of description sufficiently indicating and identifying the premises. And in *Ziegler v. Wells*,⁶³ where the action was against an express company doing business as a common carrier, the draft upon which the action was grounded was alleged in the complaint to have been signed "John Q. Jackson," and the proof showed that it was signed "John Q. Jackson, agent," and the supreme court held the variance immaterial because it would be so regarded in an action upon the draft against the drawer, the court saying: "The variance goes merely to the identity of the paper or document which it is alleged the defendants undertook to carry. The draft alleged and the draft proved are identical in legal effect; and they were also circumstantially identical, except in the matter of the word 'agent.' We cannot consider that the absence of that particle in the allegations and its presence in the proof, could have affected any substantial rights of the defendants."

But while, as before stated, mere defectiveness in matters of detail, or ambiguity and a certain degree of uncertainty, are waived by failing to specially demur, or to otherwise point out the defect, yet uncertainty in a pleading may be such as to amount to an entire failure to state a cause of action; and in that case the defendant may effectively point it out on motion in arrest of judgment or on appeal. Thus where, in an action in replevin, the complaint described the property as "about ten acres of potatoes, about four acres of squash," etc., and the findings also loosely described the property, giving to each lot a valuation, the supreme court reversed the judgment, saying:⁶⁴ "This description of goods recovered is obviously insufficient to sustain a judgment in replevin, unless, perhaps, it be aided in this instance by reference to the description set forth in the complaint. On looking into the complaint, however, the description there given is, if possible, even less definite than that found in the judgment itself."

⁶³ 28 Cal. 264, 266.

⁶⁴ *Welch v. Smith*, 45 Cal. 230.

§ 354. Exception to ruling on motion.

An erroneous ruling on motion for nonsuit, being an error in law occurring during the trial, must be excepted to. The exception need not particularize, nor is there any prescribed form for recording it. Where the motion is submitted, whether upon or without argument, it often happens that it is decided in the absence of the parties. The court often has an exception noted for the party against whom it decides. It is the better practice, in cases of such submission, to have it understood that this shall be done. If the statement on motion for new trial, or the bill of exceptions on appeal, fail to show an exception to the court's ruling on the motion, it will not be reviewed. In *Craig v. Hesperia L. & W. Co.*⁶⁵ the court said: "The main attack of appellants is upon the order granting the nonsuit. The only specification under the head of 'errors of law occurring at the trial and excepted to by the appellants' is that 'the court erred in granting defendant's motion for a nonsuit.' But the record shows no exception taken to the order granting the motion for nonsuit, and therefore that order cannot be here reviewed. The ruling of a trial court upon a motion for a nonsuit presents a question of law, and, as such, must be both excepted to and specified."

⁶⁵ 107 Cal. 675, 40 Pac. 1057. See, also, *Malone v. Beardsley*, 92 Cal. 150, 28 Pac. 218; *Warner v. Darrow*, 91 Cal. 309, 27 Pac. 737; *Flashner v. Waldron*, 86 Cal. 211, 24 Pac. 1063; *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. 243; *Cravens v. Dewey*, 13 Cal. 40. Where on motion of defendant the court took the case from the jury and decided it on questions of law, and the plaintiff interposed no objection, it was held that the latter had no standing to move for a new trial: *Nelson v. Jordeth*, 15 S. Dak. 40, 87 N. W. 140.

DIVISION 2.

PROCEDURE.

CHAPTER 18.

INSTITUTION OF THE PROCEEDING—NOTICE OF INTENTION.

- § 355. How usually instituted—Acquisition of jurisdiction.
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§ 355. How usually instituted, acquisition of jurisdiction.

The method of initiating the proceeding for a new trial varies according to the statutes of different states. In the fed-
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eral courts, there being no federal statute on the subject, it is regulated by rules of court which usually conform to the practice of the particular states wherein they exercise jurisdiction.¹ It is almost invariably instituted, however, by the movant, serving on the opposition, and filing with the clerk, a writing, usually a notice, but in some jurisdictions a petition or complaint, and in one or two a rule of court, or order of court to show cause.² Where the proceeding is independent of, and collateral to, the action in which it is instituted, as it is in a majority of states, especially in civil cases, the paper so served and filed performs the office of process, by which jurisdiction is acquired similar to that performed by the summons in an action or special proceeding. It also performs the function of the pleading on the part of the movant, corresponding with the complaint or petition in the action. This is true even where, as in California, the notice is merely one of intention, since it sets forth the grounds upon which the relief will be demanded, must be filed, and becomes the basis of subsequent proceedings. A proceeding for new trial so begun and prosecuted has many elements in common with ordinary summary statutory proceedings.

The statutory requirements are conditions precedent to the exercise of the jurisdiction. The filing and service of the paper process with which it is begun, within the prescribed time, is, in all jurisdictions, a primary essential to the acquisition of jurisdiction.³ An exception to this proposition is, of course,

¹ But there is no federal statute which requires conformity to the state practice by the federal courts in respect to motions for new trial or bills of exceptions, and where a motion for a new trial was filed and disposed of in accordance with a rule of court, it was held immaterial that the requirements of the state practice were not observed: *Tullis v. Lake Erie etc. R. Co.*, 105 Fed. 554, 44 C. C. A. 597.

² The terms "movant," designating the parties seeking the relief, and "opposition" designating the party to be adversely affected by the proceeding, will be hereinafter frequently used for brevity and convenience.

³ See *Bear River Min. Co. v. Boles*, 24 Cal. 354; *Elliott v. Osborne*, 1 Cal. 396; *De Castro v. Richardson*, 25 Cal. 49; *Ellsasser v. Hunter*, 26 Cal. 279; *Kelly v. Larkin*, 47 Cal. 58; *Clark v. Gridley*, 49 Cal. 105; *Burton v. Todd*, 68 Cal. 489, 9 Pac. 663; *California Imp. Co. v.*

made by statutes authorizing courts to set aside verdicts of their own motion in certain instances.⁴

§ 356. Diverse methods of commencing the proceeding.

Despite diversities in matters of detail, such for instance as the names of the papers to be served on the opposition and filed with the clerk, in the time given in which to do this and to take other steps, etc., there is great similarity in the exercise of the jurisdiction and practice as between state jurisdictions and between the latter and the federal courts. Few decisions, no matter where rendered, will be found wholly inapplicable to any phase of the practice, or stage of the proceeding in the other jurisdictions. Taking the notice of intention prescribed by the California code as a basis for comparison, it will be found not to differ materially from the rule nisi, and the accompanying motion of the common law, still in use in New Jersey and Pennsylvania.⁵ It will be found to differ only in respect to the degree of particularity required and in name from the written motion,⁶ brief,⁷ and complaint,⁸ in use respectively

Baroteau, 116 Cal. 136, 47 Pac. 1018; Mason v. Sieglitz, 22 Colo. 320, 44 Pac. 588; Geiss v. Franklin Ins. Co., 123 Ind. 172, 18 Am. St. Rep. 224, 24 N. E. 99; Emison v. Shepherd, 121 Ind. 184, 22 N. E. 883; State v. Maddox, 153 Mo. 471, 55 S. W. 72; First Nat. Bank v. McAndrews, 5 Mont. 251, 5 Pac. 279; Gum v. Murray, 6 Mont. 11, 9 Pac. 447; Killip v. Empire Mill Co., 2 Nev. 34; State v. Bank of Nevada, 4 Nev. 358. Though a notice be given and filed in due time, grounds alleged in a "supplemental" notice filed too late will be disregarded: State v. McDaniel, supra; Arnold v. Sinclair, 12 Mont. 259, 29 Pac. 1124; State v. McDaniel, 39 Or. 161, 65 Pac. 520. Same ruling with reference to new trial of original proceeding in supreme court: Matter of Philbrook, 108 Cal. 14, 40 Pac. 1061. For subject of jurisdiction generally, see ante, §§ 17-29.

⁴ See post, chapter 20.

⁵ See La Valle v. Electric Cutlery Co., 56 N. J. L. 59, 27 Atl. 1066; Hoban v. Sanford & S. Co., 64 N. J. L. 426, 45 Atl. 819; Voorsanger v. Field, 2 Pa. Dist. R. (Pa.) 391. Rule nisi still recognized, though practically in disuse in Georgia, see Georgia Railroad & B. Co. v. Usry, 82 Ga. 54, 14 Am. St. Rep. 140, 8 S. E. 186.

⁶ See Bellinger & C. Code of Or., § 175; Ballinger's Ann. Codes & Statutes of Wash., § 5075.

⁷ A consultation of the statutes of Georgia is recommended.

⁸ Davis v. Davis, 145 Ind. 4, 43 N. E. 935; East v. McKee, 14

in Oregon, Washington, Georgia, and Indiana. Except in the same respects, it answers all the purposes of the petition presented and filed in the states of Iowa, Kentucky and Rhode Island.⁹ In some states, in all cases, and in criminal cases in most of the states, including California, the preparation and use of a statement or bill of exceptions apart from the first moving paper, for use at the hearing of the motion, is dispensed with. As we shall presently see,¹⁰ it may be dispensed with in California and in several other states in civil cases, by moving on the minutes and framing the notice accordingly. This provision is in conformity to the practice prior to statutory requirements as to statements and bill of exceptions, still absent in many states.

§ 357. Statutory changes in California—Inapplicable decisions.

There have been numerous changes in the California statute governing such notices. The Practice Act of 1851 required that the party intending to move for a new trial should "give notice of the same within two days." Notwithstanding other changes in the statute, there was no change with respect to the time or form of the notice until the adoption of the Code of Civil Procedure.

As first adopted, the code provision read as follows: "Sec. 659. The party intending to move for a new trial must, within thirty days after the decision or verdict, file with the clerk, and serve upon the adverse party, a notice of his intention, designating therein generally the grounds upon which the motion will be made, and the time and place at which it will be brought on for hearing. The time designated must not be less than ten nor more than twenty days after service of the notice." The section was amended in 1874, so as to read as at present found in the code. By comparison it will be seen that the changes with

Ind. App. 45, 42 N. E. 368; *Blackburn v. Crowder*, 110 Ind. 127, 10 N. E. 933.

⁹ See *Scott v. Hawk*, 105 Iowa, 467, 75 N. W. 368; *Weir v. Weir*, 19 Ky. Law Rep. 2005, 45 S. W. 66; *Duncan v. Allender*, 23 Ky. Law Rep. 256, 62 S. W. 851; *Bassett v. Lowenstein*, 23 R. I. 41, 49 Atl. 97; *Wrightman v. Kruger*, 23 R. I. 78, 49 Atl. 395.

¹⁰ See post, § 369.

respect to meaning were considerable in scope, and material. It required but a short period to demonstrate the inconvenience of requiring the party to designate a day for the hearing of a motion which he might by the utmost diligence be unable to come prepared to present. Other provisions and changes will be noted in the proper connections.

It may be well here to note that many decisions under prior statutes are to be found which are entirely inapplicable. Without appropriating space to mention them, and point out the particulars wherein, and the reasons for their inapplicability, it may be well to advise caution and constant reference to the statutory provisions existing at the time they were rendered, in their use. Some of them will be necessarily referred to herein, while others will not be noticed. Care will be taken to cite as authority decisions applicable to existing code provisions only, whether rendered prior to or subsequently to the final and present form of the various relevant provisions. The same course will be pursued so far as practicable, and the same caution advised with reference to other states where reformed systems of practice have been instituted during recent years.

§ 358. Any party to the action may proceed for a new trial.

There is absolutely no limitation upon the right of any party to an action to give the notice and move for a new trial, and have the motion heard in a civil action, any more than upon the right to commence an action and have it tried. It often happens that a party finds it necessary or to his interest to move for a new trial upon a decision in his favor. It may be necessary to do this for either or both of two reasons: first, if the decision, though in his favor, does not give him all that he is entitled to, he has no other recourse, and secondly, if the findings do not support the conclusion of law, which the court has drawn, and judgment which it has rendered in his favor, the defendant may take an appeal and secure a reversal, in which case he will be subjected to the costs of an appeal as well as the delay. In *Knowlton v. McKenzie*,¹¹ some three months

¹¹ 110 Cal. 183, 42 Pac. 580. See, also, *Pico v. Supelvedo*, 66 Cal. 336, 5 Pac. 515; *Smith v. Taylor*, 82 Cal. 533, 23 Pac. 217; *Los Angeles v. Lankershin*, 100 Cal. 532, 35 Pac. 153, 556.

after a finding warranting a judgment for plaintiff for a certain sum had been filed and judgment entered for that amount, the court, on plaintiff's motion, made a new finding in his favor for a larger sum and entered judgment thereon, causing the judgment entry to be changed accordingly. Upon the defendant's appeal upon the judgment-roll alone, the supreme court reversed the judgment, holding that, if plaintiff was not satisfied with the decision in his favor, his only proper course was to have moved for a new trial, that the findings could not be otherwise changed after entry of judgment.

That a trial court may, before entry of judgment, make slight amendments to its findings after they are filed by way of correcting a mistake, or supply a defect caused by oversight, is well settled; but that it can make radical alterations amounting to the rendition of a different decision has no support upon authority. It must be done, if at all, by means of a motion for a new trial.¹² Where, upon appeal from a judgment for defendant, the judgment was reversed and the cause remanded, with directions to enter judgment for the plaintiff upon the findings, which was done accordingly, and within ten days thereafter the defendant filed notice of intention to move for a new trial, it was held, upon appeal from an order denying the motion, that the defendant, if not satisfied with the findings, should have filed his notice within the period prescribed by the Code of Civil Procedure, section 659, and that this period having elapsed before the filing of his notice, the notice came too late.¹³ "Any party aggrieved" by a decision may move for a new trial.¹⁴ It has often occurred that a party to an action considered himself aggrieved by a decision in his favor; for instance, by a verdict in plaintiff's favor for a less sum than that demanded in the complaint.¹⁵

¹² *Egan v. Egan*, 90 Cal. 15, 27 Pac. 22. "Clerical misprisions can be corrected at any time by an order of the court, but judicial errors can be remedied only through a motion for a new trial or on appeal": *Baker v. Baker*, 10 Cal. 527. See, also, *Forquer v. Forquer*, 19 Ill. 68; *Aetna Ins. Co. v. McCormick*, 20 Wis. 265; *Thompson v. Thompson*, 73 Wis. 84, 40 N. W. 671; *McLean v. Stewart*, 14 Hun, 472.

¹³ *Brady v. Feisel*, 54 Cal. 180.

¹⁴ Cal. Code Civ. Proc., § 657.

¹⁵ *Mariana v. Dougherty*, 46 Cal. 29. In this case the court said:

§ 359. Who should be served with notice.

Practically, the same rule with respect to the persons who should and whom it is necessary to serve with notice of the motion controls as in actions. There exists the same difference between necessary or indispensable and merely proper or dispensable parties. The general rule is that the notice must be served upon every party whose interest in the subject matter of the motion is adverse to, or will be affected by, the granting of the motion, or by changing the former decision of court.¹⁶ The rule and its reason were clearly explained in *Herriman v. Menzies*.¹⁷ In that case it appeared that an action was brought against several parties for an accounting upon a joint and several liability as trustees. Although the notice of appeal from the order denying a new trial had been served upon all the defendants, there had been a failure to serve the notice of intention upon one of them. The court, in affirming the order denying the motion for this reason, said: "Section 659 of the Code of Civil Procedure, however, requires that the party intending to move for a new trial shall 'serve upon the adverse party a notice of his intention.' The 'adverse party' upon whom this notice is to be served is determined by the same rules as is the 'adverse party' upon whom a notice of appeal is to be served, viz., every party whose interest in the subject matter of the motion is adverse to or will be affected by the granting of the motion or changing the former decision of the court; and a failure to serve such adverse party with the notice of an intention to move for the new trial will be attended with the same consequences as a failure to serve an adverse party with a notice of appeal from the judgment. The superior court can

"A new trial may be granted when the damages are too small as well as when they are too large"; citing *Hall v. Bark Emily Banning*, 33 Cal. 522; *McDonald v. Walter*, 40 N. Y. 551.

¹⁶ *United States v. Crooks*, 116 Cal. 43, 47 Pac. 870; *Herriman v. Menzies*, 115 Cal. 16, 56 Am. St. Rep. 82, 44 Pac. 660, 46 Pac. 730. A notice of motion for a new trial was addressed to and served upon the plaintiff's attorney alone, and the court granted a new trial. Held, that a defendant who had appeared in the action and filed an answer to the moving defendant's cross-complaint could not be affected by the order granting a new trial, and as to him, it should be reversed: *Wittenbrock v. Bellmer*, 57 Cal. 12.

¹⁷ 115 Cal. 16, 26, 56 Am. St. Rep. 82, 44 Pac. 660, 46 Pac. 730.

have no jurisdiction to re-examine an issue of fact that it has tried, and change its decision thereon, unless all the parties to the issue and former decision are properly before it. In the present case the plaintiffs sought a recovery against Mrs. Taylor, and, upon the trial of the issues involving her liability, the court made certain findings of fact in her favor, and determined that she was under no liability to account for any moneys that she had received. The action is for an accounting by all of the defendants as partners in the enterprise, and it is evident that an adjustment of their several rights and obligations growing out of the partnership venture cannot be had unless all of the parties to the transaction are before the court. The effect of granting a new trial would be to vacate the former findings of fact, and compel Mrs. Taylor to again litigate a controversy which had been decided in her favor. A new trial of these issues cannot be had without affecting her interests, and, as she had not been brought before the superior court at the hearing of the motion for a new trial, that court had no jurisdiction to grant the motion, and its order denying the same was properly made.” And the same question came before the court for review in *United States v. Crooks*.¹⁸ In this case the facts, taken verbatim from the opinion, were as follows: The United States brought the present action against the appellant and many other defendants for the condemnation of a strip of land lying between the San Leandro and San Antonio estuaries for the purpose of constructing a tidal canal by which to turn the water from San Leandro bay or estuary into the head of San Antonio estuary. The complaint contains a description of the strip of land sought to be condemned, and also separate descriptions of the portions thereof belonging to each of the defendants, of which three are alleged to be claimed by the appellant. The superior court rendered a judgment in favor of the plaintiff for the condemnation of the entire strip, and awarding damages to each of the defendants for the value of their respective parcels of land so condemned. The appellant moved for a new trial, and the same was heard upon a statement of the case and denied. From this order and also from the judgment he has appealed. The appeal from the judgment

¹⁸ 116 Cal. 43, 45, 47 Pac. 870.

was taken more than one year after its entry, and must therefore be dismissed. The appellant's notice of intention to move for a new trial was served upon the plaintiff alone, and also his notice of appeal from the order denying a new trial was served upon the plaintiff alone, and was not served upon any of his codefendants. The court in affirming the order denying a new trial said: "By the judgment in the present case the lands of each of the several defendants, as well as those of the appellant, were condemned for the use of a tidal canal between the two estuaries, and this judgment has become final as to all of the lands condemned, and also as to the amount of damages which each defendant is entitled to receive, except as to the appellant. The effect of a reversal of the order appealed from would be to set aside the judgment against the appellant, but would leave it in force as between the plaintiff and the other defendants. This would result in rendering futile the condemnation of the lands of the other defendants, since, unless the lands of the appellant are also condemned, the public use for which the judgment of condemnation was rendered—the construction of the tidal canal—and the defendant's right of passage through the same, could not be made available. The judgment for the condemnation of the strip of land described in the complaint was an entirety, and each defendant is interested in maintaining it as an entirety. A reversal as to a part would impair the rights therein which the other defendants have acquired, since, unless all the lands in this strip can be made available for a tidal canal, the plaintiff would have no right to divest any of the owners of their lands or the defendants to receive damages therefor. Each of these defendants is, therefore, an adverse party, who should have been served with the notice of intention to move for a new trial. As they were not before the court at the hearing of this motion, the court had no jurisdiction to grant a new trial, and the motion therefor was properly denied." Upon the question of proper parties to the proceeding, that is, of who may be joined in opposition by service of the notice, or not joined at the option of the movant, the authorities are not so clear. There may be parties to the record in the action who have disclaimed all interest in the subject matter, and who are not thereby affected by the judg-

ment, whether it be for or against them, or for one of the other parties and against another, as in the case of *Churchill v. Flournoy*.¹⁹ Such parties are not necessary parties to the proceeding, but there is no impropriety in serving them with notice of intention. The same is true where, in an interpleader suit, the interpleading plaintiff in an action of interpleader is discharged by consent of all the defendants who have been brought in and have interpleaded with respect to the fund in dispute.²⁰ And where, in an action on a note, the verdict was for plaintiff as against the indorsers, but in favor of the maker, it was held not ground for dismissing a motion for new trial by plaintiff that the service of the motion was not made on the indorsers.²¹

§ 360. When to give notice.

It is as essential to the jurisdiction that the notice be given within the time limited by law, as that there shall be a notice. Upon this there is practical unanimity of authority.²² But the time is limited only by the statutes governing the subject. It is immaterial that the six months have expired within which an

¹⁹ 127 Cal. 355, 59 Pac. 791. In this case it was held that the disclaiming defendant was not an adverse and hence not a necessary party to the proceeding, not having been served with the notice.

²⁰ *Long v. Superior Court*, 127 Cal. 686, 60 Pac. 464, where the interpleading plaintiff was made a party to the proceeding for new trial (see *San Francisco Sav. Union v. Long*, 123 Cal. 107, 55 Pac. 708), and the court here held it was not liable for costs on appeal from order denying a new trial.

²¹ *Adams v. Bank of S. County*, 94 Ga. 718, 20 S. E. 356.

²² See *California Imp. Co. v. Baroteau*, 116 Cal. 136, 47 Pac. 1018; *Lee (Robt. E.) Silver Min. Co. v. Englebach*, 18 Colo. 106, 31 Pac. 771; *Clark v. Perry*, 17 Colo. 56, 28 Pac. 329; *Colorado Civ. Code*, § 218; *State v. Davis (Idaho)*, 66 Pac. 932; *Idaho Code Civ. Proc.*, § 3526; *McKinney v. State*, 3 Wyo. 719, 30 Pac. 293; *Wyo. Rev. Stats.*, § 3348 as amended 1890; *Beeler v. Landidge*, 20 Ky. Law Rep. 1581, 49 S. W. 533; *Baumann v. Moseley*, 63 Hun, 492, 18 N. Y. Supp. 563; *Ariz. Rev. Stats.*, § 1748; *Mont. Code Civ. Proc.*, § 1173; *Nev. Comp. Laws*, § 3292; *Bellinger & C. Code Oregon*, § 175; *Utah Code Civ. Proc.*, § 3294; *Ballinger's Ann. Codes & Statutes of Washington*, § 5075. Nearly every case cited in the section following this is authority to the same effect.

appeal might be taken from any order which might be made on the motion.²³

It is observable that in some of the states where there are stated terms of court, as there are in most of the states, the time is shifting, and the statutes provide that the notice (or motion) "shall be filed within" a given number of days "after the verdict is rendered, but in any event before the adjournment of the term, unless the court, for good cause shown, extends the time." It would appear to be within the power of courts, under such statutes, to deprive parties of the right to move for a new trial when actions are decided upon the last day of the term. In practice, however, the term is held open for the disposal of all such motions after the actual trial and determination of causes has ceased, or the time is extended. Sometimes this is done by a general order entered in the minutes, applicable to all cases. For instance, in Colorado, the filing of a notice of the motion at the close of the term, subsequent to the findings, is sufficient to preserve the case for further consideration, and to continue the jurisdiction of the court to the next term.²⁴ But if such a motion be made at a subse-

²³ *Mallory v. See*, 129 Cal. 356, 61 Pac. 1123; California Code Civ. Proc., § 659. In this case the court said: "The superior court made an order striking from the files the notice of intention to move for new trial. The respondents contend that the notice of intention was too late: 1. Because filed more than six months after judgment; and 2. Because filed more than ten days after actual notice of the decision. On the first point it is contended that by the expiration of the time allowed for appeal a judgment becomes final, and can no longer be reviewed, either directly or indirectly, by motion for new trial. Hence, it is claimed, the time allowed by section 659 of the Code of Civil Procedure for filing the motion is to be regarded as limited to the period of six months allowed for appeal from the judgment. Numerous sections of the Code of Civil Procedure and several cases are cited in support of this contention, but do not seem to sustain it. Nor is there anything in the section itself to indicate such intention. We must hold, therefore, that—unless by the general principles of the law, in cases of laches—there is no limit of time for filing the notice other than that expressed in the section."

²⁴ See *Comer v. Chaffee*, 5 Colo. 383; Code 1877, § 204 (same); Mill's Ann. Code, § 224; *Snider v. Rinehart*, 18 Colo. 18, 31 Pac. 716; *Lee (Robt. E.) Silver Min. Co. v. Englebach*, 18 Colo. 106, 31 Pac. 771. The Indiana statutes provides that a motion for new trial may be filed at any time during the term at which the verdict or de-

quent term, no extension of time having been granted, an order striking the same from the files is proper practice.²⁵

§ 361. When time begins to run against movant.

A consideration of the question when the time is ripe for instituting the proceeding by serving and filing the prescribed paper usually depends primarily upon the solution of the problem of what amounts to a decision, and in the next place, upon what amounts to notice of the decision. Statutes usually say "verdict or other decision," a verdict being one species of decision. To this, inquiry will be first directed. Substantially the same questions have arisen and have been similarly disposed of in other states as in California, and have been the subject of the same legislation as in that state. A full discussion upon authority in that state will be a reflex of judicial discussion in other states upon the same subject.

While common-law rules and practices prevailed there was never any difficulty in determining when or how a motion for new trial could be brought on for hearing and decision. It might be during the same term or at the moment judgment was pronounced. The usual form of decision was the verdict of a jury; but even where the decision was by the court, there being no findings, the losing party usually gave notice then and there. Generally, before sentence or formal entry of judgment he would move for a new trial without stating the grounds. He was not entitled as of right to any postponement of the hearing, but a day subsequent was usually fixed for the hearing, and during the interval he prepared his moving papers. During this period and prior to the era of statutory regulation, the motion and the ruling thereon did not occupy the status of a proceeding independent of and collateral to the action. It was in fact an episode of the trial, a part of the trial.

cision was rendered, and if the verdict or decision be rendered on the last day of the term, then on the first day of the succeeding term. Where a special verdict was rendered before the last day of the term, it was held that the failure of the court to rule on motions for judgment on the verdict during the term, did not extend the time for moving for new trial to the next term: *Shaffee v. Milwaukee Mechanics' Ins. Co.*, 17 Ind. App. 204, 46 N. E. 557.

²⁵ *Clark v. Perry*, 17 Colo. 56, 28 Pac. 329.

It has been heretofore shown how the true nature of the proceeding under statutes giving and governing it was settled.²⁶ Various statutory changes were made after the first, some of which appeared to leave in doubt the point at which a decision had been reached and the time had matured for serving and filing the notice of intention. This was also fully discussed in a previous chapter,²⁷ and will only be summarized here. Where, in actions at law, the trial is by a jury, the time begins to run against the movant upon the return into court and entry in the minutes of a general verdict,²⁸ or of a special verdict disposing of all the issues,²⁹ or of a special verdict disposing of part of the issues, consistent with a general verdict returned and entered at the same time.³⁰ Where the trial is by a referee to whom all the issues have been referred, the time begins to run upon the filing of his report, finding upon all the issues.³¹ Where a

²⁶ Ante, § 14.

²⁷ Ante, c. 1.'

²⁸ *Mason v. Sieglitz*, 22 Colo. 320, 44 Pac. 588; *State v. Smith* (Idaho), 48 Pac. 1060. Where a jury is impaneled and evidence taken, it constitutes a jury trial, although the verdict be returned by order and direction of the court, and time runs against the movant from the rendition of such verdict: *Schofield v. Slaughter*, 9 N. Mex. 422, 54 Pac. 757.

²⁹ *People ex rel. Allen v. Hill*, 16 Cal. 113, 117. See, *People v. Majors*, 65 Cal. 100, 3 Pac. 401. This case should not be confounded with those cases in which all the issues are submitted to the jury and they fail to pass on some and return a special verdict on others. As to the latter, see post, §§ 254, 583-586. As to rule stated in text as to special verdicts, see *Ins. Co. v. Kierman*, 83 Ky. 468.

³⁰ See *Severy v. Chicago R. I. & P. Ry. Co.*, 6 Okla. 153, 50 Pac. 162, where although the general verdict was for plaintiff the court set it aside summarily and entered judgment for defendant on special findings. This could not have been done had the special verdict supported the general verdict.

³¹ *Careaga v. Fernald*, 66 Cal. 351, 5 Pac. 615; *Duff v. Duff*, 71 Cal. 513, 519, 12 Pac. 570; *Crowther v. Rowlandson*, 27 Cal. 376. Within ten days after the decision of a referee, and after judgment entered thereon, defendant filed notice of intention to move for a new trial, and afterward prepared his statement in support thereof, to which plaintiffs submitted amendments, which defendant refused to adopt. The referee had meanwhile absconded without filing a transcript of the evidence, and the statement and amendments were never submitted to him. Four months after the decision defendant,

referee has under a limited reference reported, then the time to give notice is ripe, when, and not until, the court has adopted them, and disposed of the issues reserved.³² Where part only of the issues have been referred to a jury, and the jury have returned a special verdict on those issues, the time begins when, and not until, the remaining issues have been disposed of by the court.³³ And it was held in *Hinds v. Gage*,³⁴ though hardly consistent with the principle that findings outside the issues are nugatory,³⁵ that if a case be tried by the court, and findings of fact be made and filed, and the case be then sent to a referee to take and state an account, the trial of the case is not complete until the filing of the referee's report.

The doctrine of the case just mentioned was incidentally recognized in a latter case and distinguished from the case then before the court, the court holding as follows: In an action for a

on notice, filed a motion for a new trial, but the notice did not state any ground on which trial would be asked but referred to an affidavit filed with the clerk, which stated that the referee had absconded and his residence was unknown, and that counsel could not incorporate in his statement the evidence on which the finding was based, or obtain a settlement of it. Held, that under Code of Civil Procedure, section 1173, requiring the party moving for a new trial to file notice within ten days from notice of the decision, the original motion having been abandoned, the motion filed four months after the decision was too late: *Ogle v. Potter*, 24 Mont. 501, 62 Pac. 920.

³² See ante, § 16.

³³ *Reclamation Dist. No. 556 v. Thisby*, 131 Cal. 572, 63 Pac. 918, holding a notice of intention to move for a new trial given after the verdict of a jury upon special issues submitted to it in an action to condemn land, and before the conclusion of the trial and the determination of the remaining issues by the court, to have been premature. Time for notice of motion for new trial is not extended by motion to modify and set aside findings; they not having been modified, changed, or added to: *California Imp. Co. v. Baroteau*, 116 Cal. 136, 47 Pac. 1018.

³⁴ 56 Cal. 486, holding that the notice of intention given in such case before the referee's report on the account was made, to have been premature.

³⁵ See *Gibson v. Wheeler*, 110 Cal. 243, 246, 42 Pac. 810; *Morenhaut v. Barron*, 42 Cal. 591; *Devoe v. Devoe*, 51 Cal. 543; *Mondran v. Goux*, 51 Cal. 151; *Green v. Covilland*, 10 Cal. 332, 70 Am. Dec. 725; *Murdock v. Clarke*, 59 Cal. 683; *Clay v. Walton*, 9 Cal. 328.

divorce a judgment decreeing the divorce and providing for a division of the community property is the final judgment, although it contains ancillary provisions appointing a referee to take testimony and report as to what property is community; and a motion for a new trial, made after the entry of such judgment, but before the coming in of the referee's report, is not premature. The trial court has jurisdiction to hear and determine the motion.⁸⁶ The court said (in part): "The action is for divorce, and before any steps were taken in the matter of a motion for a new trial, the cause had been tried upon its merits, and the court had made and filed its decision and findings upon all the issues in the cause necessary to the entry of a judgment and decree for divorce, and had ordered judgment and decree accordingly. As ancillary to that decree, the court found that the plaintiff was entitled to a division of the community property, but was at the time unadvised as to what was community property. It appointed a referee to take testimony and report to the court upon that question. But that question was not one necessary to be investigated prior to the entry of judgment for divorce. In practice, the settlement of alimony and the distribution of community property are matters which are frequently and properly done after judgment—sometimes long after—and, so far as relates to alimony, is the subject of frequent change. Orders in this behalf are orders after judgment, and are themselves the subject of appeal. It is never held that motions for a new trial must or can properly be delayed until the final settlement of all matters which may lawfully be the subject of consideration and order, or even of supplemental decree after judgment. The reference in this case was not one for the taking of an account, or for report upon any subject necessary to enable the court to render judgment upon the issues in the cause, but was one for the purpose of securing information necessary for carrying a judgment already ordered into effect." The doctrine of the *Hinds v. Gage*

⁸⁶ *Sharon v. Sharon*, 79 Cal. 633, 701, 22 Pac. 26, 131. The question was raised and argued upon motion to dismiss the appeal which was denied. After the decision reversing the order denying a new trial the same point was strenuously urged on petition for rehearing, which was denied. See opinion on the petition (p. 701).

case owes its origin to a dictum in an earlier case.⁸⁷ The practical result of many California cases expressly holding as above shown that findings outside the issues are idle and useless, and give no support to a judgment, overrule such doctrine. Its inconsistency with the principle just mentioned, as well as its inherent absurdity, is ably pointed out in a Montana case,⁸⁸

⁸⁷ *Crowther v. Rowlandson*, 27 Cal. 376. This was an action to declare certain instruments void. After findings were made there was a reference to have an account stated. In the opinion was a dictum to the effect that the trial was not complete until the report of the referee was filed. This dictum was quoted and treated as a decision in *Hinds v. Gage*, *supra*, and *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570. The question is merely touched upon in *Harris v. San Francisco Sugar Ref. Co.*, 41 Cal. 393; *Jones v. Clark*, 42 Cal. 180; *Clark v. Dunnam*, 46 Cal. 205; *Bates v. Gage*, 49 Cal. 126; *Williams v. Conroy*, 52 Cal. 414; *White v. Conway*, 66 Cal. 383, 5 Pac. 672; *Dominguez v. Mascotti*, 74 Cal. 269, 15 Pac. 773; *San Diego etc. Co. v. Neale*, 78 Cal. 63, 20 Pac. 372; and in *Sharon v. Sharon*, 79 Cal. 701, 22 Pac. 26, 131.

⁸⁸ *Arnold v. Sinclair*, 11 Mont. 556, 567, 28 Am. St. Rep. 489, 29 Pac. 340. But some of the California cases referred to in the opinion in this case are distinguishable from it. For instance, in *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570, the court's findings as first filed were incomplete, and consequently it could not be said that the issues were all disposed of before the coming in of the referee's report. The facts in the last-mentioned case were as follows: In an action to establish a trust and for an accounting certain special issues were submitted to a jury, who found thereon adversely to the defendants. The latter thereupon moved to set aside the verdict on the grounds of insufficiency of the evidence to justify it, and of errors in the instructions. No statement or bill of exceptions was made on this motion, which was denied by the court, on the ground that the verdict was merely advisory, and that the errors, if any, could be corrected when the case was finally submitted. The court subsequently filed its findings, covering the principal issues in the case, upon which the interlocutory judgment establishing the trust and directing the accounting was entered, and thereafter filed additional findings covering the matters embraced in the account, upon which final judgment was entered. No notice of the filing of the latter findings was served on the defendants. On the eleventh day after the filing of the additional findings, the defendants moved for a new trial on a bill of exceptions, which was settled by the court. It was held, that the motion for a new trial could not properly have been made until after the findings on the matters embraced in the account had been filed, and that on such motion the defendants could

the court saying: "The complaint does not ask judgment for any amount of money. It was not the nature of the action for the complaint to so pray. The complaint prayed for the determination of certain matters. Those matters were all determined by the judgment. The complaint prayed for certain relief. Every item of such relief was granted. Every right alleged, every relief prayed, by plaintiff, was determined in his favor. Now what remains? Simply to put plaintiff in possession of that which the court has determined that he is entitled to; simply to execute the judgment, which has settled the rights of the parties; simply to carry out relief granted. The court takes possession of the property by its receiver. The referee, as an accountant, states the account. The court parcels to this one his half and to that one his half, and so executes the judgment. We are of opinion that the facts of this case fall within the rule above pointed out, and that the matters remaining to be ascertained are for the purpose of carrying out the judgment; not for the purpose of framing the judgment. The judgment is that each party is entitled to one-half of the assets of the partnership, after the debts are paid. That is the determination of their rights. That is the judgment. The execution of this judgment is all that remains. . . . We do not understand that it can be laid down as a general principle that a trial is incomplete, and hence a judgment is not final, simply because a reference is had for some purpose; that is to say, the fact of a reference being had after judgment does not in itself determine that the judgment is not final. Nor do we think that the California cases intend to so hold, although in some of the cases from that court the principle is announced so generally and without qualification that the reader may be led to conclude that the court intended to announce that the fact of a reference after judgment in itself determined the non-final character of the judgment. But the case of *Clark v. Dunnam*, following *Jones v. Clark*, and the latter cases, especially *Sharon v. Sharon*, bring the principle nearer to what we believe is the correct rule, as we have indicated above. A reference after judgment does not, per se, determine the character

be heard on their bill of exceptions as to that part of the trial which was had before the jury.

of the judgment, as to its finality. It may be final, or it may be an interlocutory order, depending upon its facts. If the reference be for the purpose of executing the judgment only, after the judgment has finally determined all the rights of the parties, then the judgment is final.”

In case the plaintiff takes a voluntary nonsuit, with leave to move to set the same aside, that constitutes a decision for the purpose of giving notice of intention.³⁹

In case there are more than one defendant, and there is no verdict as to one of them, the time does not arrive for giving notice of intention by any party to the action until there has been a trial and decision as to him.⁴⁰ Although the court in *Rankin v. Central Pac. R. R. Co.*⁴¹ places such a verdict in the same category as that of a special verdict, failing to dispose of all the issues submitted to the jury, the two cases are not analogous. In the latter case, as has been shown,⁴² the losing party, or either party for that matter—may move for a new trial on the ground that the verdict is against law. The better practice, however, is to have the jury retire and complete the verdict under direction of the court.

Where the trial is by the court, the notice may be given when, and not until, it has made and filed its findings of fact.⁴³

³⁹ See *Whipley v. Dewey*, 17 Cal. 314. This case is to the effect that such leave is merely equivalent to leave to move for a new trial.

⁴⁰ *Benjamin v. Stewart*, 61 Cal. 605; *Rankin v. Central Pac. R. Co.*, 73 Cal. 93, 94, 15 Pac. 57; *Jenkins v. Parkhill*, 25 Ind. 473; *Settle v. Allison*, 8 Ga. 208; S. C., 52 Am. Dec. 393; *People v. George*, 3 Idaho, 108, 27 Pac. 680. The opinion in *Rankin v. R. R. Co.*, *supra*, is able and instructive.

⁴¹ 73 Cal. 93, 15 Pac. 57.

⁴² See *ante*, §§ 250-254.

⁴³ *Fountain Water Co. v. Dougherty*, 134 Cal. 376, 66 Pac. 316; *Connolly v. Ashworth*, 98 Cal. 206, 33 Pac. 60; *Dominguez v. Mascotti*, 74 Cal. 269, 15 Pac. 773; *Coveny v. Hale*, 49 Cal. 532. In the first of these cases it was also held that notice of intention prior to findings was premature and ineffective. The findings must not only be signed but filed in order to constitute a decision. In *Connolly v. Ashworth*, *supra*, the court, after quoting sections 662 and 663 of the Code of Civil Procedure, said: “In view of these provisions it is clear that the trial of a cause by the court is not concluded until the decision is filed with the clerk; and when the term of office of

The Nevada statute is so construed as to accomplish a somewhat different result from that of the California statute. It is there held that, in a case tried without a jury, the decision of the court is distinct from the findings, and that the time within which notice of intention to move for a new trial must be given begins to run from the announcement of the decision.⁴⁴ And this rule holds good whether the judge's announcement of his decision is made before or after the making and filing of findings.⁴⁵

But even under the California code, findings may be waived; and, in that case, there is a decision when the court has announced its decision in open court and the same has been entered in the minutes. Such announcement and entry constituted a decision prior to the adoption of the Code of Civil Procedure, expressly requiring written findings unless they were waived;⁴⁶ and the same must necessarily constitute the deci-

the judge who tried the case expires before such decision is filed, the fact that it was signed by him, and ordered by his successor in office to be filed with the clerk, and was so filed, is not sufficient to sustain the judgment entered thereon": See, also, *Hastings v. Hastings*, 31 Cal. 95; *Van Court v. Winterson*, 61 Cal. 615; *Warring v. Freear*, 64 Cal. 56, 28 Pac. 115; *Comstock Q. M. Co. v. Superior Court*, 57 Cal. 625; *Polhemus v. Carpenter*, 42 Cal. 384; *Anglo-Californian Bank v. Mahoney* (U. S. C. C.), 2 Pac. C. L. J. 128; *Mace v. O'Reilley*, 70 Cal. 231, 11 Pac. 721. And in *Dominguez v. Mascotti*, *supra*, the court said: "The notice of motion for a new trial was given before the findings were signed, and was therefore premature and ineffectual. Under the present system the findings constitute the 'decision.' Until the findings are signed and filed there is no decision and nobody is 'aggrieved,' within the meaning of section 657 of the Code of Civil Procedure. That a premature notice of motion is ineffectual has frequently been decided": *Mahoney v. Caperton*, 15 Cal. 313; *Bates v. Gage*, 49 Cal. 126; *Hinds v. Gage*, 56 Cal. 487; *Spottiswood v. Weir*, 66 Cal. 529, 6 Pac. 381.

⁴⁴ *Robinson v. Benson*, 19 Nev. 331, 10 Pac. 441. In this case the court followed *Elder v. Frevert*, 18 Nev. 278, 3 Pac. 237, in which the differences between the California statutes and those of Nevada were pointed out and the decisions in California shown to be inapplicable.

⁴⁵ *Robinson v. Kind*, 25 Nev. 261, 275, 59 Pac. 863, 62 Pac. 705.

⁴⁶ *Sawyer v. San Francisco*, 50 Cal. 370, 375; *Gray v. Palmer*, 28 Cal. 416; *Peck v. Courtis*, 31 Cal. 208; *Genella v. Relyea*, 32 Cal. 159.

sion where this requirement of the code is dispensed with, which would have the effect to place the parties in the same condition as if such provision had never been adopted.⁴⁷ In case of findings being waived, the mere announcement of the decision, without entry in the minutes, would not, under this rule, amount to a decision or "the rendition of judgment."⁴⁸

All trials in equity cases are by the court, whether a jury is interposed or not; and the verdict of a jury in an equity case, being advisory merely, does not constitute a decision until the same is adopted by the court. This holds true whether part or all the issues were referred to the jury.⁴⁹

⁴⁷ See *Biagi v. Howes*, 66 Cal. 469, 471, 6 Pac. 100, where the question being whether the movant's presence in court when findings were waived and the decision was orally announced and entered in the minutes was charged with actual notice of the decision, the court said that the opposition was entitled to written notice of the decision, notwithstanding "he is present in court when the decision is rendered, and waives findings," etc. To same effect, *State ex rel. Keane v. Murphy*, 19 Nev. 89, 95, 6 Pac. 840. Above case cited approved and followed in same case (p. 97).

⁴⁸ *Hastings v. Hastings*, 31 Cal. 95, 98. In this case the court said: "Still, until the decision itself has been entered in the minutes, or reduced to writing by the judge and signed by him, and filed with the clerk, the case has not been tried to a legal intent. This statute mode of deciding and evidencing the decision of cases is exclusive." The purpose of the law is accomplished by a decision written, signed and filed.

⁴⁹ *Bell v. Marsh*, 80 Cal. 411, 414, 22 Pac. 170; *Bates v. Gage*, 49 Cal. 126; *Warring v. Freear*, 64 Cal. 54, 28 Pac. 115; *Spottiswood v. Weir*, 66 Cal. 525, 6 Pac. 381; *Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106; *Stanton v. Crane*, 25 Nev. 114, 119, 58 Pac. 53. In *Brandt v. Wheaton*, 52 Cal. 430, which was a suit in equity to quiet title, all the issues having been submitted to a jury and a general verdict having been rendered, upon which judgment had been entered, without the court having made findings of fact or conclusions of law. The court said: "In the briefs of appellant and respondent this is called 'an action to quiet title.' It is a suit under sec. 738 of the Code of Civil Procedure, and the complaint is to be treated as a bill in equity. The general verdict of the jury, therefore, is to be disregarded. If this were the only question to be considered, the cause would be remanded to the court below to find the facts." The rule thus announced has been subsequently adhered to: *Richardson v. Eureka*, 110 Cal. 446, 42 Pac. 965. In *Bell v. Marsh*, *supra*, the court after referring to sections 656 and 659 of the Code of Civil

The same rule applies where issues of fact are tried in probate proceedings; so that the verdict of the jury in a probate proceeding, under chapter 3, article 5, of the Code of Civil Procedure, in which special issues are submitted to the jury by the

Procedure and stating the facts, said: "These two sections of the code must be read together. No proceedings for a new trial can be had until 'after the trial and decision by a jury or court.' In equity cases the findings of the jury are merely advisory. A case has not been tried until all the issues have been disposed of, and there has been no decision until the court has passed upon the facts, and drawn its conclusions of law therefrom. And so it has been held that in equity cases the time to give the notice does not begin to run until the court has either adopted or rejected the findings of the jury: *Bates v. Gage*, 49 Cal. 126; *Warring v. Freear*, 64 Cal. 54, 28 Pac. 115. The case at bar was treated by the court and by the parties in all respects as an action in equity; whether properly or improperly so treated it is unnecessary now to inquire. To hold that the time to give the notice of intention begins to run from the rendition of the special verdict would necessarily put each party to the trouble, in the protection of his rights, of preparing and prosecuting motions for a new trial before either party knows what the decision of the court is to be. Order affirmed." From this it would seem that the parties may give a case the status of a suit in equity though in fact an action at law. The soundness of the proposition may well be doubted. The rule as stated in the text is fully established in Montana as appears by the opinion in *Power v. Lenoir*, *supra*, and cases cited therein. The court said: "Counsel for plaintiff object to the consideration by this court of any question presented by the motion for a new trial, and asks to have the statement stricken out on two grounds; that the notice of intention to move for a new trial was not given in time, and that the statement was not served in time. The facts appearing in the record are that the attorney for defendants served a notice of intention on the attorney for plaintiff on December 28, 1896, within seven days after the findings by the jury were made and filed. Nothing further was done under this notice. It was not filed by the clerk. On February 4th, defendants' attorney gave notice to counsel for plaintiff that the court on February 3d, had formally adopted the findings of the jury and entered judgment for plaintiff. On February 11th defendants' attorney properly served and filed with the clerk another notice of intention to move for a new trial. On March 21st, he served his statement upon counsel for plaintiff, who thereupon submitted amendments, but, before doing so, reserved their right to object to the settlement of the statement, or any consideration of it, because it had not been served in time. It is not disclosed whether the amendments were agreed to by the defendants' counsel or not.

court of its own motion, is not the verdict of the jury in an action tried by jury, within the meaning of section 659 of the Code of Civil Procedure, but is merely advisory to the judge, and of no force until adopted by him. A motion for new trial

On April 8th, the court settled the statement, incorporating therein all amendments proposed by plaintiff's counsel, except one, and also his objections to the settlement. This was done without notice. No stipulation was made between the parties, nor order of court, extending the time for serving the statement. The motion for a new trial was overruled on June 22, 1896. Plaintiff's objections to the statement were properly reserved: *Sweeney v. G. F. & C. Ry. Co.*, 11 Mont. 34, 27 Pac. 347. Counsel insist that, to have any efficacy as a basis for a motion for a new trial, the notice of intention should have been served and filed with the clerk within ten days after December 21, 1896; citing Code of Civil Procedure, section 1173. We do not think this position tenable. This cause is one involving questions cognizable in equity only. The parties are not entitled in such cases to a trial by jury. If the court calls a jury to aid in the trial, the findings made by the jury are advisory only. The judgment must emanate from the judge. The jury serves to enlighten his conscience, not to control his judgment. The trial is a trial by the judge and the decision reached is his. He will adopt the findings of the jury, if they satisfy his conscience; otherwise he will disregard them and make such findings as will do so: *Gallagher v. Basey*, 1 Mont. 457; S. C., on appeal, 20 Wall. 676; *Mantle v. Noyes*, 5 Mont. 274, 5 Pac. 856; *Beck v. Beck*, 6 Mont. 318, 12 Pac. 694; *Leggat v. Leggat*, 13 Mont. 190, 33 Pac. 5; *Zickler v. Deegan*, 16 Mont. 198, 40 Pac. 410; *Lawlor v. Kemper*, 20 Mont. 13, 49 Pac. 398." The same rule is equally well settled in Nevada. In *Stanton v. Crane*, *supra*, the court followed *Duffy v. Moran*, 12 Nev. 98, where the court said: "In a chancery suit the action is not tried until the verdict has been sanctioned and established by the chancellor. In this case it was not tried until after the agreement of counsel as to what the judgment should be. There is nothing in the transcript showing that the court submitted to the jury anything but the special issues stated, and, it being a case of purely equitable cognizance, we cannot presume the court called the jury for any other purpose except to be advised by it. Certainly, the fact that the jury found against the plaintiff upon the issues submitted to them was necessarily no proof that the court would finally so find after argument, or that the court would find against him in any respect. We think this cause was tried by the court. If we are correct in the conclusions already expressed, the court should have filed his findings within ten days after the trial, either adopting or rejecting the findings of the jury. By its acts it did so in effect. Our opinion is that the plaintiff not only had a right to think he had ten days after find-

made before a decision by the court in such proceeding is premature, and mandamus will not lie to compel the settlement of the statement on such motion.⁵⁰ This rule applies to the trial by jury of an equitable defense to an action at law, upon which special issues are submitted to the jury, if the case is treated by the court and by the parties in all respects as an action in equity, whether properly or improperly.⁵¹ And where, in an equity case, special issues of fact were submitted to a jury, and the court adopted the verdict of the jury on these issues, it was held there had been no decision because the court had not proceeded to make and file findings from the evidence covering the whole case.⁵²

But a certain condition or event must intervene between the decision and the point of time within ten days after which the law requires the movant to give notice of intention. The opposition must serve him with written notice of the decision,

ings were filed by the court in which to give his notice, but that he in fact had that length of time after the court rendered its judgment for costs against him on the third day of December.”

⁵⁰ *James v. Superior Court of Santa Cruz County*, 78 Cal. 107, 20 Pac. 241.

⁵¹ *Bell v. Marsh*, 80 Cal. 411, 22 Pac. 170; *Garrard v. Garrard*, 135 Ind. 15, 34 N. E. 442, 809.

⁵² *Warring v. Freear*, 64 Cal. 54, 28 Pac. 115; citing *Bates v. Gage*, 49 Cal. 126; *Wingate v. Ferris*, 50 Cal. 195; *Hastings v. Hastings*, 31 Cal. 95. In *Warring v. Freear*, the court said: “Upon adopting the verdict it became the equivalent of a finding by the court, but it did not cover the issues raised by the pleadings. Where the verdict of a jury, in an equity case, does not respond to all the issues, it becomes the duty of the court, if it adopts the verdict as far as it is responsive to the issues, to proceed and find upon the evidence which has been given and any other which may be offered by the parties, as to the other issues not covered by the verdict; and to make and file its decision in writing, stating the facts found and the conclusions of law drawn therefrom, as required by sections 632, 633 of the Code of Civil Procedure. Until such a decision has been made and filed, the case cannot be considered as tried, unless the filing of such a decision has been waived. There was no waiver of findings in this case, and as the court failed to ascertain and determine the rights of each of the parties to the use of the water of the stream in controversy, the judgment and order denying the motion for a new trial must be reversed and the cause remanded for a new trial.”

unless the former waives it. Hence there are two important preliminary matters to be considered before discussing the actual giving of the notice of intention, namely the duty incumbent upon the opposition to give the movant notice of the decision and thus set the time running against him for giving the notice of intention, and the subject of waiver of such notice on the part of the movant. A section will be devoted to each.

§ 362. Same—Notice of decision.

Having fully explained what it is of which the successful party must give notice to the other, in order to begin the count of time against him, it is in order to point out what constitutes the due performance of this duty, which place a limit upon the right of the movant.

It has been long settled and frequently decided that will unless the notice be waived, written notice of the decision must be served.⁵³ The movant has the time allowed by law from and after written notice of the decision within which to file and serve his notice of intention, motion or application, according to the wording of the statute, and as long as he does no act waiving his right, no advantage can be taken of the fact that he has actual knowledge. The settled rule on this subject, excluding actual knowledge as a substitute for the notice required by the statute, was thus stated and explained in *Mallory v. See*:⁵⁴ "No written notice of the filing of the decision was given, but it is claimed that the notice of intention was filed 'more than ten days after appellants had actual notice of the decision.' Two affidavits were filed in support of this con-

⁵³ Many authorities could be cited. The rule is declared to be operative and without other qualification than as shown in the next succeeding section in *Mallory v. See*, 129 Cal. 356, 61 Pac. 1123; *Carpentier v. Thurston*, 30 Cal. 123; *Roussin v. Stewart*, 33 Cal. 208; *Burnett v. Stearns*, 33 Cal. 468; *Polhemus v. Carpenter*, 42 Cal. 397; *Biagi v. Howes*, 66 Cal. 469, 6 Pac. 100; *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570; *Sullivan v. Wallace*, 73 Cal. 307, 14 Pac. 789; *Symons v. Bunnell*, 80 Cal. 330, 22 Pac. 193; *Waddinsham v. Tubbs*, 95 Cal. 249, 30 Pac. 527; *Gumpel v. Castagnetto*, 97 Cal. 15, 31 Pac. 898; *Oberlander v. Fixen*, 129 Cal. 690, 62 Pac. 254; *Corbett v. Swift*, 6 Nev. 194.

⁵⁴ 129 Cal. 356, 61 Pac. 1123. See, also, *Forni v. Yoell*, 99 Cal. 176, 33 Pac. 887; and cases cited in last preceding note.

tention—one by one of the defendants, to the effect that she had informed one of the plaintiffs that judgment had been entered and that thereupon 'both plaintiffs and defendants commenced to use the water' in controversy under, and as prescribed by, said judgment; the other, by one of defendant's attorneys to the effect that after the judge had decided that the plaintiffs were entitled to the use of the water in suit for four, and defendants for three, days in each week, an agreement was made between him and one of plaintiff's attorneys that 'plaintiffs' time should commence, and defendants' time end, at noon of each Sunday'; and that under this agreement the conclusions of law and judgment so provided. These allegations are not denied. It can hardly be doubted—if we apply to the case the ordinary rules of evidence—that the plaintiffs had actual notice or knowledge of the decision; that is to say, not necessarily of the date, but of the fact. Plaintiff's attorneys were informed of the judge's decision, and agreed upon terms to be embodied in the written decision and judgment about to be filed, and which were filed accordingly; and immediately thereafter all of the parties commenced to use the water as prescribed in the judgment. If, therefore, the rule is as claimed by respondents—that is to say, if the time prescribed by section 659 of the Code of Civil Procedure commences to run from the time of actual notice or knowledge to the party moving for a new trial, we would have to sustain the order appealed from. But to hold this would be to go beyond any case yet decided, and, we think, beyond the intention not only of the statute, but of any of the decisions."

The statute neither states nor suggests anything as to the form of such notice. It would probably be considered sufficient in all cases if the notice contained enough to convey information that the case has been decided and how decided. But the giver of the notice should see that it accomplishes these purposes. "If there is any ambiguity in the terms of the notice, rendering its meaning doubtful, the construction must be most strongly against the plaintiff. It is his document. The language was chosen by himself. If it fails to convey clearly his meaning to the other party the fault is his, and the consequences must be

on him.”⁵⁵ A notice “that a decree, a copy of which is herewith served upon you, has been this day entered in the action in accordance with the decision rendered” by the court upon a previous date, giving the substance of the decree, was held a sufficient notice of the decision.⁵⁶ And a party in whose favor a decision has been rendered, but who is dissatisfied with the decision, may give a notice to the opposite party, who is also dissatisfied, which will perform double duty as a notice of the decision and of intention to move for a new trial.⁵⁷ In *Kelleher v. Creciat*⁵⁸ it was

⁵⁵ *Carpentier v. Thurston*, 30 Cal. 123.

⁵⁶ *Gumpel v. Castagnetto*, 97 Cal. 15, 31 Pac. 898.

⁵⁷ *Waddingham v. Tubbs*, 95 Cal. 249, 30 Pac. 527. The meaning of the text will be better understood by giving the facts and views of the court in this case in the language of the court as follows: “The ground of the second contention, viz., that written notice of the decision was served on January 6, 1891, is that on that day respondent served on the attorneys for defendant her written notice of intention to move for a new trial, which, among other things stated: ‘The defendant will take notice that the plaintiff intends to move the court to set aside and vacate the decision and judgment heretofore rendered and entered herin, and to grant a new trial in this case upon the following grounds: 1. Insufficiency of the evidence to justify the findings and decision,’ etc. Service by copy of this notice on January 6, 1891, was admitted by defendant’s attorneys. As to whether the actual notice to defendant of the decision of the court, and his action upon that notice on December 29th, constituted a waiver of formal written notice of the decision, the cases seem not quite harmonious: See *Biaga v. Howes*, 66 Cal. 469, 6 Pac. 100; *Gray v. Winder*, 77 Cal. 527, 20 Pac. 47; *San Fernando H. A. v. Porter*, 58 Cal. 81, *Barron v. Deleval*, 58 Cal. 95; *Mullally v. Benevolent Society*, 69 Cal. 559, 11 Pac. 215; *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409. Perhaps they may be so reconciled as to sustain the position of respondent; but it is unnecessary to decide this question, since I think under the circumstances plaintiff’s notice of intention to move for a new trial, served on defendant January 6th, contained a sufficient notice in writing that a decision of the court had theretofore been rendered in this case, although the notice also stated that plaintiff intended to move for a new trial. The notice contained the title of the cause, and the language is ‘the decision and judgment heretofore rendered and entered herein,’ which means the decision which was heretofore rendered herein, and must have been so understood. The code requires no particular form of notice. Nor does it require notice of what the decision was. Simple notice in writing that a decision has been rendered is all that is required.”

⁵⁸ 89 Cal. 38, 26 Pac. 619.

held that the delivery of a mere copy of the findings and decree upon the adverse party was sufficient to set the time running against him with respect to the giving of notice of a motion for new trial. Undoubtedly, the better form is a notice referring to an attached or accompanying copy of the findings, or of the minute entry of the decision where findings have been waived, or of the report of a referee, where that was the mode of trial. Such is the usual practice.

It is scarcely necessary to call attention to the fact that the statute does not require notice to be given in order to set the time running against the movant where the trial was by a jury.

§ 363. Waiver of notice of decision.

The notice discussed in the next preceding section may be waived. It may not only be waived, but the party entitled to notice may do that which will estop him from denying that he has not been notified of the decision according to the statutory requirements. But even in that case his act may with propriety be spoken of as a waiver. It constitutes a clear case of waiver for the movant to serve and file his notice of intention, or file any paper reciting the filing of findings, without waiting to receive notice of the decision.⁵⁹ So service of a

⁵⁹ *Thorne v. Finn*, 69 Cal. 251, 10 Pac. 414; *Cottle v. Leitch*, 43 Cal. 320; *California Imp. Co. v. Baroteau*, 116 Cal. 136, 47 Pac. 1018; *Corbett v. Swift*, 6 Nev. 194. In *Thorne v. Finn*, *supra*, the court said: "The defendants contend that their first notice of intention having been served and filed before a notice of the decision was served on them, it was a nullity, and that all proceedings under it were null. But a party may waive notice of the decision, and by giving notice of intention to move for a new trial he does waive it. This was substantially held in *Cottle v. Leitch*, 43 Cal. 322, and we think held correctly. Here the defendants not only gave notice of intention, but took all other steps preparatory to bringing that motion to a hearing down to a settlement of that statement in February, 1885, nearly three years after their first notice of intention was given. We do not think in this state of circumstances that the contention of defendants, that their notice first given was null, should be regarded with any consideration. If their conduct is not a waiver of notice of the decision of the cause, it would be difficult to say what conduct would amount to a waiver." In *California Imp. Co. v. Baroteau*, *supra*, the court said: "The appellant contends that there was no notice served on him of the filing of the

statement on appeal is a waiver of written notice of the filing of findings of the court, and in such a case a notice of intention to move for a new trial must be filed within ten days after the service of statement.⁶⁰ And in an action for partition it was held that, since after the court has passed upon the partition made by the referees and approved it, the guardians of infant parties are authorized to consent to the judgment as entered, it is not necessary to notify them of the judgment in order to impose upon them the obligation to move for a new trial within ten days after the judgment.⁶¹ So where the record upon appeal from an order denying defendant's motion for a new trial showed that notice of their intention to move for a new trial was not filed within ten days after service by them of notice of a motion to dismiss the action, upon the ground of the failure of the plaintiff to enter judgment within six months after the filing of the findings and decision, the date of which was stated in the notice, it was held that they must be held to have thereby

findings, and that therefore the time for making a motion for a new trial had not expired when such motion was made; but section 659 provides not only that the motion must be made within ten days 'after notice of the decision'; and it has been definitely settled that where it appears affirmatively that the party moving for a new trial had actual notice of the decision, no formal service of a written notice is necessary: *Gray v. Winder*, 77 Cal. 525, 20 Pac. 47; *Mullally v. Irish-American Ben. Soc.*, 69 Cal. 559, 11 Pac. 215; *Wall v. Heald*, 95 Cal. 365, 30 Pac. 551; *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409; *Corbett v. Swift*, *supra*, was a case of waiver, or admission of notice of the decision by giving notice of, and perfecting an appeal from the judgment, the court saying: "Had the appellant taken no action, no advantage could have been taken of his actual knowledge; but he appealed from the whole judgment, recognizing it in its entirety, asking of this court its vacation without the preliminary step or motion for a new trial. The natural presumption is that such motion was waived. Had the notice of rendition of judgment in fact been given, and the appeal been taken, it would not be claimed that appellant could make his motion for a new trial at this time. Why any more, when it is apparent that the full object of the notice has been accomplished, and he has suffered no wrong. It would look like trifling with the practice of the courts to adopt any other view than that announced by the district court."

⁶⁰ *Corbett v. Swift*, 6 Nev. 194; *Hunter v. Truckee Lodge*, 14 Nev. 24.

⁶¹ *San Fernando Farm Homestead Assn. v. Porter*, 58 Cal. 81.

waived the written notice of the decision as of that date, and, there being no extension of time, their notice of intention to move for a new trial came too late, and the order denying the new trial must be affirmed.⁶² The same conclusion was reached where it appeared of record that, on the day when the judgment was entered in favor of the plaintiff, the defendant applied for and obtained an order of court staying execution upon the judgment, and served notice of such order on all the parties to the action. It was held that such facts constituted a waiver, as of that date, of written notice of the decision, which could not be impaired by the subsequent action of another of the defendants in serving notice of the decision upon said defendant.⁶³ And it may be stated generally that the object of the law is to give ten days after actual knowledge of the decision in which to give notice of intention to move for new trial. That object is fully attained when the record shows that the party entitled to notice has acted in court upon actual knowledge of the decision. Such action constitutes a waiver of formal notice.⁶⁴

Where the moving party has acted in open court or in the proceedings of the cause as if he had formal notice of the decision, his acts constitute a waiver of such formal notice.⁶⁵

A notice of motion for a new trial by the defendant, served and filed more than ten days after written notice of the decision appears to have been waived by facts appearing in the record, is too late.⁶⁶ In such cases the thing which is considered important is not that the party has furnished conclusive proof of actual notice, but that by a distinct act he has evinced an intention to waive a statutory duty imposed upon the other party for his benefit. The mere fact that he has taken a step in the action wholly inconsistent with a claim that he has not been served with notice is held in some of the cases above cited to amount to a waiver. Perhaps with stricter propriety such acts should be said to estop the party from denying notice.

⁶² *Forni v. Yoell*, 99 Cal. 173, 33 Pac. 887.

⁶³ *Mohr v. Byrne*, 135 Cal. 87, 67 Pac. 11.

⁶⁴ *Gray v. Winder*, 77 Cal. 525, 20 Pac. 47.

⁶⁵ *Mallory v. See*, 129 Cal. 356, 61 Pac. 1123.

⁶⁶ *Gardner v. Stare*, 135 Cal. 118, 67 Pac. 5. To same effect, are most of the preceding cases cited in this section.

But the foregoing proposition contemplates some unequivocal act during proceedings in the cause in open court, properly resulting in a minute entry, or some other act resulting in the placing of record or among the files in the action, conclusive evidence of knowledge of the decision on the part of the party entitled to the notice. Hence it was held that the fact that a party's attorney knew of the court's decision, and agreed as to the terms to be embodied in the written decision, and judgment, did not constitute a waiver of his rights to the written notice thereof.⁶⁷ The same rule applies when the party is served with a copy of the proposed findings and judgment. This does not constitute notice of the decision, which must be given after entry of judgment in order to set the time running against the losing party.⁶⁸ On this ground it was held in *Keane v. Murphy*,⁶⁹ a case tried without a jury, where the judge announced his decision in open court in the presence of counsel for the losing party, who, at that time, requested the attorney for the opposing party to "add no more costs in entering judgment than he could help," which was assented to, that such acts and conversations did not amount to a waiver of the right to have a written notice of the rendering of the decision. The court in the course of the opinion said: "It is averred in the petition of relator that the request, to the effect that 'no more costs be added in entering judgment than could be helped,' was made on the street, and in conversation relating to her sickness, which made her incapable, at the time, of advising as to what steps should be taken in the case, and this averment is not denied; but the result would be the same if it had been made in open court. Certainly there was no express waiver; and plaintiff's attorney, to whom the request was made, does not claim, in his affidavit, that he was thereby induced to think that notice was waived, or that he and his associates failed to give the notice by reason of the request. He says he consented to what was asked, but he nowhere asserts that he, in fact, did anything, or failed to do anything, that would not have been

⁶⁷ *Mallory v. See*, 129 Cal. 356, 61 Pac. 1123.

⁶⁸ *First Nat. Bank v. McCarthy*, 13 S. Dak. 356, 83 N. W. 423.

⁶⁹ 19 Nev. 89, 96, 6 Pac. 840.

done, or left unperformed, if he and relator's attorney had had no conversation."

§ 364. Extension of time to give notice of intention—By order of court.

There are two methods by which time additional to that allowed by law may be obtained, extension granted by the court, and that granted by the opposite party. The power of the court to extend the time by its order is purely statutory.⁷⁰ We have seen that the whole proceeding is statutory, and that every condition precedent to the right to a hearing on the motion is jurisdictional.⁷¹ The power to extend the time for serving and filing the notice of intention is given by section 1054 of the California Code of Civil Procedure, and is identical in so far as it relates to notices with the corresponding provision of the old Practice Act. Consequently, the decisions under the two statutes are similarly applicable. The question of the court's power to extend the time under the Practice Act, as amended in 1861, was first presented in *Harper v. Minor*,⁷² and the power was conceded. In the course of the opinion Sawyer, J., said: "Section 195, as thus amended, gives the party, as an absolute right, ten days after receiving written notice of the filing of the findings of the court, within which to serve his notice of intention to move for a new trial. And section 530 authorizes the court, upon good cause shown, to extend 'the time allowed by this act' for 'the service of notices other than of appeal,' provided that 'such extension shall not exceed thirty days.' There can be no doubt that this provision covers notices of intention to move for a new trial. 'The time allowed by this Act' for 'service of notices' may be extended, and a special exception is made of notices 'of appeal' only. 'Expressio unius est exclusio alterius.' We can see no reason, we confess, why this authority to extend the time for giving notice of intention to move for a new trial should be given, for it would in most, if not in all, cases, be less trouble and inconvenience to give the notice than to procure an extension of time. But there

⁷⁰ *Burton v. Todd*, 68 Cal. 485, 489, 9 Pac. 663.

⁷¹ *Ante*, § 355, et seq.

⁷² 27 Cal. 107, 113.

can be no doubt that the power is given." Nevertheless, in *Brichman v. Ross*,⁷³ decided under the code, the power was denied. But as the court held that the right to object had been waived by a failure to present it in the lower court, the expression of the court denying the right may be treated as a dictum. Soon afterward, however, in *Burton v. Todd*,⁷⁴ the point was again presented, and the court took the precaution to expressly repudiate and "overrule" what had been stated in disparagement of the power in the prior case, and affirmed the power of the court, or a judge thereof, to extend the time not exceeding thirty days, as in all other matters covered by said section 1054. But this section is the full measure and limit of authority. The court cannot extend the time, and thus revive a right already lost; and an order purporting to extend the time to give the notice made after the time to give it has expired is in excess of jurisdiction and void, at least as to the excess.⁷⁵ It was held in a Washington case⁷⁶ contrary to the above proposition, but under a statute giving the court the power, such statutory provision not existing elsewhere.

Such an order, being made within the court's jurisdiction, will be liberally construed in advancement of the remedy. Thus it was held that an order extending the time "for preparing and filing motion for a new trial," should be construed to extend the time to give notice of intention to move for a new trial,⁷⁷ and in another case that an order made before the expiration of the time given by the statute, extending the time a certain number of days, without something therein appearing to the con-

⁷³ 67 Cal. 601, 8 Pac. 316.

⁷⁴ 68 Cal. 485, 488, 9 Pac. 663. To same effect, *Cottle v. Leitch*, 43 Cal. 320; *Leavenworth v. Billings*, 26 Wash. 1, 66 Pac. 107. A party cannot extend time by voluntary acts of his own, as by moving to set aside findings, stay entry of judgment, etc.: *California Imp. Co. v. Baroteau*, 116 Cal. 136, 47 Pac. 1018.

⁷⁵ *Clark v. Crane*, 57 Cal. 629; *Burton v. Todd*, 68 Cal. 485, 9 Pac. 663; *Thompson v. Lynch*, 43 Cal. 482; *Cooney v. Furlong*, 66 Cal. 522, 6 Pac. 388; *People v. Center*, 61 Cal. 194; *Killip v. Empire Mill Co.*, 2 Nev. 34; *State v. First Nat. Bank*, 4 Nev. 358.

⁷⁶ *Bailey v. Drake*, 12 Wash. 99, 40 Pac. 631. See, also, *Metropolitan West Side etc. Co. v. White*, 166 Ill. 375, 46 N. E. 978.

⁷⁷ *Cottle v. Leitch*, 43 Cal. 320.

trary, extended it for the time named from and after the time so limited by the statute.⁷⁸ It would have been unreasonable to have held otherwise; but it is always an easy matter to insert in such orders words indicating the date when they take effect, so that just what they purport may be ascertained without searching the record.

But an order extending the time is of no value if made before the ten days allowed by the statute expire and the notice of intention be served and filed within the period,⁷⁹ and though it has not been expressly decided, yet it stands the test of like reasoning that if time be given extending the time beyond that allowed by law and before the time of extension named in the order, but after the statutory period has expired he serves and files his notice, the order is only good up to the date when the notice is given. The question is one of no practical value, except with reference to its effect upon the time for preparing and serving statements, bills of exception and affidavits. And where a single order was made on January 25th, allowing a defendant thirty days additional to the ten days allowed by statute to serve and file his notice, and the same period for "statement, or affidavits, or both therewith," and on the 28th of January, he served his notice, it was held that the time for his statement and affidavits expired on February 22d, twenty days after said January 28th. (The order was only good for a twenty day extension under the statute.)⁸⁰

As a result of the statutes and decisions in California, it may be stated that, before the expiration of the ten days given by statute within which to move for a new trial, a superior court, or judge thereof, may, for good cause, extend the time, not exceeding thirty days within which to serve and file a notice of intention to move for new trial, but that after the time fixed by statute has expired neither the courts nor judges thereof have jurisdiction to extend or revive such right. The same view

⁷⁸ *Emeric v. Alvarado*, 64 Cal. 529, 541, 2 Pac. 418. Time given for filing and serving "statement" cannot be given effect of extending time to file and serve notice: *McGrath v. Tallent*, 7 Utah, 256, 26 Pac. 574.

⁷⁹ *Cottle v. Leitch*, 43 Cal. 320.

⁸⁰ *Cottle v. Leitch*, 43 Cal. 320.

is generally entertained and enforced by the courts of other states.

§ 365. Extension of time to give notice of intention—By stipulation.

Though the right to move for a new trial is statutory, and does not exist if the prescribed steps are not taken within the time allowed by statute, as against a party who stands upon the statute and insists upon a strict compliance therewith, yet the time for every step to be taken in relation thereto may be waived or extended by consent of the parties.

The Code of Civil Procedure of California, section 283, provides that an attorney can bind his client in any of the steps of an action by written agreement filed with the clerk, or entered upon the minutes of the court. Section 1054 provides that when an act to be done relates to the preparation of bills of exception, or to the service of notices other than of appeal, the time may be extended by the court, but that such extension shall not exceed thirty days without consent of the adverse party.

In *Simpson v. Budd*,⁸¹ it was held that the statutory time for giving notice of intention to move for a new trial and the preparation of a bill of exceptions may be extended without an order of court by stipulation of the attorneys, even though the stipulation itself be not filed within the time for doing the acts themselves.

§ 366. Requisites of notice of intention—Generally.

It was shown in a preceding section that the paper with which the proceeding is instituted is variously named and varies slightly in form, according to the statute under which it is instituted; also that anyone who considers himself aggrieved by the verdict or other proceeding may move for a new trial. Whatever the name used to designate it in stating the essentials of this first paper is immaterial.⁸² The only substantial dif-

⁸¹ 91 Cal. 488, 27 Pac. 758. See, however, *Hecht v. Heinman*, 83 Mo. App. 284, holding contra.

⁸² In Washington (Ballinger's Ann. Codes and Stats., § 5075) and in Oregon (Bellinger etc. Code. Or. § 175) the "motion" is filed;

ference found between any two jurisdictions is with respect to the degree of specification required. A difference in the same respect will be found between notices of intention to move on statement or a bill of exceptions and those designating the minutes to be used on the motion.

The principal parts of the notice are, in addition to title of the court and cause: (1) a statement of the intention; (2) a designation of the grounds relied upon; (3) a designation of the moving papers, whether a statement, or a bill of exceptions, or either of these and affidavits, or affidavits alone; (4) the signature, and (5) the address. Each of these requisites will be considered in a separate section.

It seems almost superfluous to also state that the notice must be in writing.⁸³ In *Bear River and Auburn Water and Mining*

in California, Idaho, Montana, Nevada, Utah, and many other states a "notice of intention" is filed and served. Notice of intention to move for a new trial stands for the formal motion, and the questions may be ruled upon although no motion is filed: *East v. Mooney*, 7 Utah, 414, 27 Pac. 4; *Callanan v. Lewis*, 79 Iowa, 452, 44 N. W. 892. For requisites of motion see *Boarman v. Hinckley*, 17 Wash. 126, 49 Pac. 226. A notice of motion otherwise in proper form, which contains a notice that the motion will be made upon the minutes of the court, and upon a ground specifically stated in the notice, will operate as a notice of intention as well as a notice of motion: *Fletcher v. Nelson*, 6 N. Dak. 94, 69 N. W. 53.

⁸³ See *Mallory v. See*, 129 Cal. 356, 61 Pac. 1123; *Code Civ. Proc.*, § 1010; *Flateau v. Lubeck*, 24 Cal. 364; *Bear River etc. Min. Co. v. Boles*, 24 Cal. 354; *Killip v. Empire Mill Co.*, 2 Nev. 34; *State v. Bank of Nevada*, 4 Nev. 358. A notice of intention to move for a new trial which is entered in the minute-book, and which recites that the defendant will, as soon as the transcript of the evidence is made, move the court for a new trial upon the grounds to be set forth in the motion held insufficient: *State v. Fry*, 10 Mont. 407, 25 Pac. 1055. But under a statute requiring notice of motion to be served and filed within a given time it was held that the notice was waived when the motion was made at the time the verdict was rendered, and the hearing was then adjourned by mutual consent to a future day, and both parties were represented at the hearing: *O'Gorman v. Teets*, 45 N. Y. Supp. 929. The disadvantages of recognizing any other than a written notice were thus shown in *Killip v. Empire Mill Co.*, *supra*: "Was there a notice such as the statute requires? The practice act, section 195, requires a notice of intention to move for a new trial to be given within two days after trial,

Company v. Boles,⁸⁴ the party attempted to give notice by minute entry the next day after the verdict was rendered and judgment thereon entered. The court found it unnecessary to directly pass upon the question of sufficiency of such notice because the opposite party was absent, but took occasion to say: "The only safe mode to pursue, especially since the amendment to section 195, in 1863, requiring the grounds of the motion to be stated in the notice, is to give formal notice in writing. A written notice, even where another form is admissible, is less liable to lead to mistakes, and is always preferable." This question is set at rest in California by a provision of the Code of Civil Procedure requiring all notices to be in writing, and by the requirement that the notice of intention shall be "filed and served."

§ 367. Same—Statement of movant's intention.

After some uncertainty and conflict in the decisions, it is now settled that under the California code it is sufficient to describe the intention of the movant in the words of the statute, and to say that he intends to move the court "to grant a new trial." This conclusion was reached upon a review of prior decisions in *Locke v. Moulton*.⁸⁵ It had been previously held, in *Sawyer v. Sargent*,⁸⁶ that a notice stating that the movant

and within five days thereafter the necessary statement or affidavits to be filed, etc. This section does not, in terms, require the notice of intention to be given in writing; but the act requires each of these things to be done within a specified time. If the notice is not given in writing, as a matter of practice, it would be extremely difficult to determine, with certainty, the date at which such notice was given, and the result would be a great temptation to perjury and misrepresentation of facts, and uncertainty and unsatisfactory records. This court would frequently be compelled to weigh testimony and determine doubtful facts, when, under a proper practice, no such doubt could arise."

⁸⁴ 24 Cal. 354.

⁸⁵ 96 Cal. 21, 30, 30 Pac. 957. Lest any one be misled by it, attention should be called to a strange misapprehension into which the court fell in *Savings etc. Soc. v. Moore*, 68 Cal. 156, 159, 8 Pac. 824, saying, "the 'decision' includes not only the conclusions of law but the facts found." See definition of new trial, Code Civ. Proc., § 656.

⁸⁶ 65 Cal. 259, 3 Pac. 872.

"intends to move the court to vacate and set aside the judgment, and to ask the court for a new trial," etc., was insufficient. It had been also previously held unnecessary that the notice should state any intention whatever as to the decision, the reason being that the vacating of the decision was a necessary legal consequence of granting a new trial.⁸⁷ In *O'Connell v. Main etc. Hotel Co.*,⁸⁸ the *Sawyer v. Sargent* case was virtually overruled, and in the *Locke v. Moulton* case it was expressly overruled. In the last-mentioned case the notice stated that the movants intended "to move the court to set aside and vacate the judgment rendered and entered herein, and to grant a new trial," etc. The court held that all these words expressive of the intent of the party giving the notice except "intends to move the court to grant a new trial in this case" were surplusage. There is a distinction in this respect between the part of the notice now under consideration and that containing the assignments or specifications. If the latter be directed at the judgment, the consequences, as will be seen, may be important. It follows that it is immaterial what intention is expressed in the notice, provided it express an intent to apply, ask or move for a new trial, if any such other purpose be not inconsistent with such intent.

Whatever may have been the previous practice, or that at present prevailing in other states, it is not only improper, but might, under the prevailing statutory provisions, raise a serious question as to the validity of the notice if a particular day were designated upon which the party intended to carry out the intention. No such matter should appear in the notice. While the above suggestion is true under code provisions found in California and several other code states, of course it is wholly inapplicable where common-law practice is in vogue, and also where the common-law method has been re-enacted.⁸⁹

⁸⁷ *Bander v. Tyrrel*, 59 Cal. 99. Cited and followed in *Heinlen v. Heilbron*, 71 Cal. 557, 12 Pac. 673.

⁸⁸ 90 Cal. 518, 27 Pac. 373. Cited and followed in *Locke v. Moulton*, 96 Cal. 21, 30, 30 Pac. 957. A notice of motion for a new trial, directed against the "findings" rather than against the "decision" of the court, is sufficient, as under the Code of Civil Procedure, §§ 632, 633, the findings constitute the decision: *Haight v. Tryon* (Cal.), 34 Pac. 712.

⁸⁹ As for methods of bringing on the hearing under notice of intention, see post, §§ 379, 380.

§ 368. Same—Must designate grounds relied upon.

The rule in California with respect to the portion containing specifications is that if the motion is to be made upon a statement or bill of exceptions alone, the grounds thereof may be stated generally, that is, in the language of the statute.⁹⁰ But whether a general assignment be sufficient, or specifications be required, the movant waives all causes for a new trial not set forth in his written grounds therefor.⁹¹ And a failure to state any ground whatever is fatal to the motion.⁹² Nor can a list of specifications in a motion attached to or accompanying the notice be regarded.⁹³

Under sections 355 and 356 of the Criminal Practice Act of Montana, the application for a new trial must be made upon motion, and written notice of motion must be filed within a given time. If the application is made upon the ground that the court has misdirected the jury upon a material matter of law, the application must be made upon a bill of exceptions or upon the minutes of the court, "and the notice of the motion must state particularly the error upon which the party making the application relies." And this is required, notwithstanding the act of September 13, 1887, which provides that the charge and instructions given by the court to the jury are deemed ex-

⁹⁰ *Butterfield v. Central Pac. R. R. Co.*, 37 Cal. 381, 385; *Smith v. Christian*, 47 Cal. 18, 19; *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416, 427, also holding specifications other than general to be out of place in the notice.

⁹¹ *Mulligan v. Montana Union Ry. Co.*, 19 Mont. 135, 47 Pac. 795. See, also, *In re Yoakum's Estate*, 103 Cal. 503, 37 Pac. 485; *Reagan v. McKibben* 11 S. Dak. 270, 76 Nev. 943; *Neidner v. Frederick*, 69 Ill. App. 622; *Moore v. Jennings*, 119 Ind. 130, 12 Am. St. Rep. 383, 20 N. E. 748, 21 N. E. 471. A motion for new trial on the ground that a finding is "against and contrary to the weight of the evidence" is adequate to challenge the sufficiency of the evidence to sustain the findings: *Adams v. Smith (Wyo.)*, 70 Pac. 1043. A notice of intention to move for a new trial on the ground that the evidence was insufficient "to justify the findings" is sufficient, the word "findings" being equivalent to "decision": *Cobban v. Hecken (Mont.)*, 70 Pac. 805.

⁹² *Street v. Lennon M. & M. Co.*, 9 Nev. 251, 21 Am. Rep. 738, holding also that disregard of the statutory requirement herein is not aided by designating the grounds in the statement.

⁹³ *State v. Whaley*, 16 Mont. 574, 41 Pac. 852.

cepted to, and that no exception need be taken thereto, nor any bill of exceptions filed. This statute does not, ipso facto, make the instructions a bill of exceptions, but in order to bring them before the court for review, they must be embodied in a bill of exceptions or statement.⁹⁴

A notice of intention, performing as it does the office of a pleading, should be free from all such defects as would render a complaint insufficient on demurrer. Accordingly, it was held that while the notice might state conjunctively two or more, or all, of the grounds given by statute, yet to put it in the alternative, leaving it uncertain which of the several grounds were relied on was objectionable.⁹⁵

One or more of the specifications may be defective while others in the same notice are sufficient. Thus it was held that, since, in an action of tort, the question of excessive damages is that raised by an assignment that "the damages are excessive" this question is not raised by an assignment of error in "the assessment of the amount of recovery";⁹⁶ and under a notice of intention to move for a new trial because of excessive damages, insufficiency of evidence, and errors in law, it was held the objection that the court permitted the jury to take improper papers to their rooms could not be considered, since that was an irregularity, and hence a distinct ground for new trial.⁹⁷

The specifications should be directed at the findings or de-

⁹⁴ *State v. Black*, 15 Mont. 143, 38 Pac. 674. For other decisions under statutes construed as requiring particular specification in motion or notice, see *State v. Pilgrim*, 17 Mont. 312, 42 Pac. 856; *State v. Mason*, 18 Mont. 364, 54 Pac. 557; *Benham v. Lemhi Min. etc. Co.*, 18 Mont. 591, 46 Pac. 816; *Bradshaw v. Territory*, 3 Wash. Ter. 265, 266, 14 Pac. 594; *Dawson v. Baum*, 3 Wash. Ter. 469, 19 Pac. 46.

⁹⁵ *Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654; cited and approved in *Hall v. Harris*, 1 S. Dak. 285, 36 Am. St. Rep. 734, 46 N. W. 931.

⁹⁶ *Lake Erie & W. R. Co. v. Acres*, 108 Ind. 548, 9 N. E. 453. A motion for a new trial on the ground that the finding is contrary to law, and is not sustained by the evidence, does not raise the question of the amount of the recovery: *Thickstun v. Baltimore & O. R. Co.*, 119 Ind. 26, 21 N. E. 323.

⁹⁷ *Cranmer v. Kohn*, 11 S. Dak. 245, 76 N. W. 937. See *South Dakota Comp. Laws*, section 5088.

cision, and not at the judgment. Accordingly, it was held that the statement of grounds of the motion for a new trial, in the notice of intention, as being "insufficiency of the evidence to support the judgment" and that "the judgment is against law," must be disregarded by the court, as neither of these grounds is by the code made a cause for granting a new trial, and that it was error to grant a new trial upon either ground so designated.⁹⁸ And it

⁹⁸ *Mazkewitz v. Pimentel*, 83 Cal. 450, 23 Pac. 527; *Fenner v. Simon*, 26 Ind. App. 628, 60 N. E. 363; *Froman v. Patterson*, 10 Mont. 107, 24 Pac. 692. In the first case above cited the court said: "It appears by a bill of exceptions on the order granting the new trial that the grounds designated in the notice of intention as those upon which the motion would be made were: '1. Insufficiency of the evidence to support the judgment; 2. The judgment is against law; 3. Errors of law occurring at the trial, and duly excepted to by the defendants.' The last is the only one of the designated grounds above stated upon which the court could grant the motion. Neither of the other designated grounds are by the code made a cause for granting a new trial. We are unable to discover in the transcript that any error in law occurred at the trial to which defendants, or either of them, excepted. In fact we do not find that anything that occurred at the trial was excepted to by either party. It was, therefore, error to grant the motion for a new trial on this ground, and a fortiori on either of the grounds designated in the notice of intention to move for a new trial; *Sawyer v. Sargent*, 65 Cal. 259, 3 Pac. 872; *Martin v. Matfield*, 49 Cal. 42; *Quinn v. Smith*, 49 Cal. 165; *Kelly v. Mack*, 49 Cal. 524; *Coveny v. Hale*, 49 Cal. 555; *Little v. Jacks*, 67 Cal. 165, 7 Pac. 449; *Young v. Wright*, 52 Cal. 407. In the face of these decisions, we cannot feel at liberty to hold that the first and second causes designated in this motion are equivalent to the sixth cause enumerated in the code. Nor can we, with a bill of exceptions in the record which contains what purports to be a copy of the notice of intention given in this case, presume that there was another notice given which designated other causes than those designated in the notice brought here in such bill of exceptions." And in *Froman v. Patterson*, *supra*, the court said: "Our statute provides as one ground for motion for a new trial: 'Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.' The plaintiff did not state that cause for moving for a new trial, but this reason as designated in this notice was 'for the reason that the judgment is contrary to law.' The clause 'or that it is against law,' found in the sixth subdivision of section 296, clearly does not refer to the judgment. A new trial is to be 'a re-examination of an issue of fact.' The clause 'it is against law,' refers to the 'verdict or other decision,' of the issue of facts ten-

has been held that since the word "decision" in the statute is used in the sense of finding upon the facts, where the cause is tried by the court, a motion for a new trial on the ground that "the finding and judgment of the court is contrary to the evidence," and "the finding and judgment of the court is contrary to law," stated no statutory ground for a new trial.⁹⁹ But when the notice of motion specified, among other grounds, "that said decision, findings and decree are against the law," and "errors in law occurring at the trial," and then stated that "the following errors committed by the court on the trial of said cause" will be relied on: "That the court erred in finding and decreeing" for defendant, the specification of error was sufficient.¹⁰⁰

§ 369. Same—Must designate papers to be used on motion.

With regard to specifications in the notice, codes and statutes generally make different provisions bearing upon notices of intention to move upon a statement or bill of exceptions and to move upon the minutes; and such statutes usually provide with respect to the latter in substance as follows: "When the motion is to be made upon the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of motion must

dered by the pleadings. If the decision of the issue was made by a jury it is usually termed a 'verdict,' if made by a referee, or by the judge trying an issue without a jury, the determination of the issue of facts is usually termed the 'decision' or 'findings of fact.' The very subject provided for by this statute, i. e., 'new trials,' is declared by statute to be 'a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referees.' A decision of what, by a court, jury, or referees is here contemplated? Certainly a decision of the 'issue of fact.' The judgment is the conclusions of law drawn from the facts found by a judicial investigation. Such conclusions are generally stated in an imperative form."

⁹⁹ *Hubbs v. State*, 20 Ind. App. 181, 50 N. E. 402. A notice of motion for a new trial, which specifies as a ground for the motion insufficiency of the evidence to support or justify the findings, is a valid notice under section 657 of the Code of Procedure: *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22.

¹⁰⁰ *Jones v. Adams*, 17 Nev. 84, 28 Pac. 64.

specify the particulars in which the evidence is alleged to be insufficient; and if the ground of the motion be errors in law occurring at the trial, and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely. If the notice do not contain the specifications here indicated, when the motion is made on the minutes of the court, the motion must be denied.”¹⁰¹ As to the sufficiency of the specifications when an attempt is made to comply with the requirements of such provisions, it may be stated here that the same tests and rules apply as to the specifications in statements.¹⁰² And it may be further stated here briefly, and without qualification, that a failure to comply will be fatal to the motion, in so far as insufficiency of evidence and errors in law are relied upon in a statement, and in so far as insufficiency of evidence is relied upon a bill of exceptions.¹⁰³

A motion for a new trial cannot be considered when the intention does not state what the motion will be based upon, whether upon affidavits, minutes of the court, bill of exceptions, or a statement of the case, as required by section 659 of the Code of Civil Procedure.¹⁰⁴

The code provision of Montana ¹⁰⁵ is the same as that of California, and provides that “a party intending to move for a new trial must file and serve notice of his intention designating the grounds thereof, and whether “the same will be made upon affidavits, or the minutes of the court, or a bill of ex-

¹⁰¹ Cal. Code Civ. Proc., § 659, subd. 4.

¹⁰² See post, § 433, et seq.

¹⁰³ *Packer v. Doray*, 98 Cal. 315, 33 Pac. 118, 34 Pac. 628; *Neale v. Depot Ry. Co.*, 94 Cal. 425, 29 Pac. 954; *Weyl v. Sonoma Valley R. R. Co.*, 69 Cal. 202, 10 Pac. 510; *Gumpel v. Castagnetti*, 97 Cal. 15, 31 Pac. 898; *Froman v. Patterson*, 10 Mont. 107, 24 Pac. 692; *Hall v. Harris*, 1 S. Dak. 279, 36 Am. St. Rep. 37, 46 N. W. 931. The objection may be taken in appellate court: *Buckley v. Atthorff*, 86 Cal. 643, 25 Pac. 134; *Gregg v. Garrett*, 13 Mont. 10, 31 Pac. 721. A specification in the notice that the evidence of plaintiff showed the property in suit to be worth a certain sum which the jury had disregarded (there being no evidence to the contrary) is sufficient: *Distad v. Shanklin*, 11 S. Dak. 1, 75 N. W. 205.

¹⁰⁴ *Hughes v. Alsip*, 112 Cal. 587, 44 Pac. 1027; *Hill v. Beatty*, 61 Cal. 292; *Gregg v. Garrett*, 13 Mont. 10, 31 Pac. 721.

¹⁰⁵ Montana Codes Ann. 1895, § 1173; Montana Code Civ. Proc., § 298.

ceptions, or a statement of the case." It was held that, where the notice omitted to state on what the motion would be made, an appeal from an order overruling the motion would be dismissed, unless the defect had been waived by the adverse party.¹⁰⁶

The notice need not, however, confine the movant to one only of the papers or matters which may be used as stated in the statute, but may state that the motion will be made upon any two or more of them.¹⁰⁷ In *Garner v. Glenn*,¹⁰⁸ the court, after quoting the statute, said: "Particular stress is laid upon the use of the words 'option of the moving party' and the disjunctive word 'or,' connecting the several grounds upon which the motion may be made. We do not think this construction tenable. While the appellant may select any one ground given by the statute, and rely upon it alone, he certainly is not precluded from relying upon two or more, or all of them, if in his judgment the necessities of his case require it. And if he sees fit to rely upon one ground and abandon the others, when he comes to file his motion for a new trial, he can then elect to do so. To notify the respondent that he intends to rely on all of them cannot prejudice his rights in any manner that we can see. If he were to put his notice in the alternative, and thus leave it uncertain which of the grounds he relied on, this would be objectionable. Our statute is a copy of the California statute." And a motion for a new trial made solely upon a statement of the case is properly heard and determined, although the notice of the motion states that it will also be made upon the minutes of the court and a bill of exceptions.¹⁰⁹

The failure to designate any moving papers may be waived. Of course, it may be expressly waived, as by stipulation; but it

¹⁰⁶ *Gregg v. Garrett*, 13 Mont. 10, 31 Pac. 721.

¹⁰⁷ *Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654; *Duncan v. Times-Mirror Co.*, 120 Cal. 402, 52 Pac. 652; *Hall v. Harris*, 1 S. Dak. 279, 36 Am. St. Rep. 730, 46 N. W. 931.

¹⁰⁸ 8 Mont. 371, 375, 20 Pac. 654; citing and approving *Hart v. Kimball*, 72 Cal. 284, 13 Pac. 852. The court in the Montana case just stated uses the word "ground" and "grounds" in referring to the moving papers, whereas grounds have a different well-known meaning, with reference to new trials.

¹⁰⁹ *Hart v. Kimball*, 72 Cal. 283, 13 Pac. 852.

may be also waived by any act evidencing an intention not to take advantage of the defect. It was held waived by a stipulation that a statement of the case might be used on the motion.¹¹⁰

But where a waiver is claimed, something must appear from which an intention to waive the defect can be implied. Accordingly, in *Hughes v. Alsip*,^{110a} Justice McFarland, delivering the opinion, said: "The notice of motion for a new trial does not state what it will be based on; that is, it does not state whether it would be made upon affidavits, minutes of the court, bill of exceptions, or statement, as required by section 659 of the Code of Civil Procedure. Respondents are not estopped from making this point because they presented amendments to a certain bill of exceptions proposed by appellant and took part in the settlement of said bill. Appellant had the right to a bill of exceptions to be used on his appeal from the judgment; and an objection by respondents that his notice of motion for a new trial was defective would not have affected his right to have the bill settled. He could have waived his motion for a new trial and still have been entitled to his bill of exceptions. If this contention of appellant were about a statement on motion for a new trial it would present a different aspect. The respondents moved in the court below that the motion for a new trial be dismissed for the defect in the notice above stated."

§ 370. Same—Must be properly signed.

Although the proceeding for a new trial is to a great extent independent of the action, proceeding upon its own merits, having reference to the record in the action because it evidences the subject matter concerning which relief is sought, yet it is so far connected with the action as to require a substitution of attorneys before an attorney not of record in the action can be legally recognized as having authority to institute or prosecute the proceeding for new trial. The proceeding must be

¹¹⁰ *Rutherford v. Talent*, 6 Mont. 112, 9 Mont. 886. See *Hibernia Sav. etc. Soc. v. Moore*, 68 Cal. 158, 8 Pac. 824, holding all such irregularities waived. However, there were none. The whole subject as to waiver pertaining to statements, bills of exceptions, etc., fully considered: Post, chapter 22.

^{110a} 112 Cal. 587.

conducted by the respective attorneys for the parties to the action, until their authority is revoked or other attorneys are substituted.¹¹¹ The substitution must be made according to the statutory provision on that subject.¹¹² The mere fact that an attorney has been associated with the attorney of record at the trial is not equivalent to a substitution, and gives the attorney so associating no authority to sign the notice of intention.¹¹³

§ 371. Same—Should contain address.

It is not thought to be essential to the sufficiency of a notice of intention that the name of the party to the action to be served with it or of his attorney should appear upon it, even in the caption, if the title of the court and cause in common use in the action appear, and it be actually served upon all the attorneys for parties entitled to be served. Such is the result of the language of the court in *Cook v. Suden*,¹¹⁴ where the objection was that the name of a defendant did not appear in the caption. Although the court adverted to the fact that the notice in that case had been not only served upon, but addressed to attorneys who were the attorneys for all the adverse parties. Still it is the uniform, and undoubtedly the better, practice to fully and correctly address the notice.

§ 372. Service and filing of notice—Herein of improper joinder.

It is scarcely necessary to go into the general subject of service. The general rules and requirements as to the manner of serving papers in civil actions are applicable here. There is,

¹¹¹ *Hobbs v. Duff*, 43 Cal. 485, 491. In this case a firm of attorneys had signed the notice as "attorneys for defendants," being attorneys for defendant Duff only. Held, no notice for any other defendant except Duff. See, also, on rule stated in text: *Beardsley v. Fram*, 73 Cal. 635, 15 Pac. 310; *McMahon v. Thomas*, 114 Cal. 591, 46 Pac. 732.

¹¹² Cal. Code Civ. Proc., § 284. Until change made under this section, by one or the other of the modes mentioned, the former attorney must be recognized: Code Civ. Proc., § 285; *Prescott v. Salthouse*, 53 Cal. 221, 222, so holding notwithstanding order entered associating another attorney.

¹¹³ *Prescott v. Salthouse*, 53 Cal. 221, 222.

¹¹⁴ 94 Cal. 443, 29 Pac. 949.

however, a peculiarity in the statute¹¹⁵ that the notice of intention must be "filed and served," literally implying that the filing and service are one and the same, or, at any rate, contemporaneous acts. Yet it would often be difficult to both "file and serve," or serve and file as to all the parties requiring to be served on the same day, and in practice no such strictness is ever exacted. If advantage were sought to be taken of the fact that the service and filing were on different days, both being consummated within the time limited, the courts would probably frown upon it. But in the absence of decisions exactly in point, and in view of decisions in the analogous case of notices of appeal,^{115a} unaffected by the amendment of 1874 to section 940, the safer course undoubtedly is to both file and serve the notice upon the same day.

A mere deposit of the notice with the clerk is not a filing; the fees must be paid, unless the clerk actually files it notwithstanding the nonpayment of the fee. And receipt of a notice of intention on the last day for filing it without payment of the fee was held not to constitute a filing, although the party paid the fee three days afterward, and the clerk, at his request, then filed it as of the date when received.¹¹⁶

¹¹⁵ Code Civ. Proc., § 659.

^{115a} See post, §§ 533, 539.

¹¹⁶ *Davis v. Hurgren*, 125 Cal. 48, 57 Pac. 684. See *Sutton v. Symons*, 100 Cal. 576, 35 Pac. 158, holding failure to file within the time fatal to the motion, though served in time; *McBroom etc. Co. v. Gandy*, 18 Wash. 79, 50 Pac. 572, presumption that the service on same date as filing, nothing appearing to the contrary; *Turner v. Bailey*, 12 Wash. 634, 42 Pac. 115, to same effect (as to statement); *Beck v. Thompson*, 22 Nev. 109, 36 Pac. 562. In *Davis v. Hurgren*, *supra*, the court said: "Section 639 of the Code of Civil Procedure provides that a party intending to move for a new trial must, within ten days after the verdict of the jury, file with the clerk his notice of intention. In the case at bar the ten days expired on the 23d of February. On that day the appellants sent their notice of motion to the clerk, but the clerk did not file the same because the fee therefor was not paid; and three days afterward, at the request of the appellants, who then paid the fee, the clerk indorsed it as filed February 23d. The act of March 28, 1895, (Stats. 1895, p. 267. et seq.), provides that on the filing of a notice of motion for a new trial the party filing the same must pay to the clerk a fee of two dollars, and that 'county officers must . . . demand the payment

A party having ground for a new trial may lose the benefit of it by proceeding jointly with a party not so favorably situated with reference to the proceeding; and where there is any doubt as to the identity of relation or equality of right therein, a separate notice should be given though they be represented by the same attorney. It is not necessary, however, in order to constitute separate notices that they be on separate papers. Thus it was held that a notice by three defendants to the effect that they and each of them would move the court for a new trial was a joint and several motion; that is they all asked for a new trial as to all, and each for a new trial as to himself.¹¹⁷ It has been decided in states other than California having similar statutory provisions, that where two proceed jointly, neither is entitled to a new trial unless both are.¹¹⁸ Another and a clearer expression of the same proposition is that where a verdict against defendants is conceded to be correct as to one of them, the other, in order to attack it, must make a separate motion for a new trial.¹¹⁹ It is not so clear upon judicial authority in California as one could wish, how the question would be decided if it were squarely presented. In *Boehmer*

of all fees in civil cases in advance.' The notice, therefore, was not filed in time; the mere fact that the clerk received it on the 23d did not constitute a filing; it was not his duty to file it without the fee; he did not file it; and he could not have been compelled to file it on that day.'"

117 *Bathke v. Krassin*, 78 Minn. 272, 80 N. W. 950. Where two cases by the same plaintiff against different defendants were tried together by the same jury, and separate verdicts rendered, each of the defendants should file a separate motion for a new trial: *Western Assur. Co. v. Way*, 98 Ga. 746, 27 S. E. 167.

118 *Coverdale v. Edwards*, 155 Ind. 374, 58 N. E. 495; *Whiteley Malleable Castings Co. v. Berington*, 25 Ind. App. 391, 58 N. E. 268; *Wiggenhorn v. Kountz*, 23 Neb. 690, 8 Am. St. Rep. 150, 37 N. W. 603; *Scott v. Chope*, 33 Neb. 41, 49 N. W. 940; *Porter v. Banking Co.*, 40 Neb. 274, 58 N. W. 721; *Miller v. Adamson*, 45 Minn. 99, 47 N. W. 452; *Hogan v. Peterson*, 8 Wyo. 549, 59 Pac. 162. In the first of these cases it was held that a joint motion by all defendants sued jointly, after judgment against all, which should have been granted as to same had they moved separately, but could not, as to others must be denied as to all.

119 *Kentucky etc. Cement Co. v. Morgan*, 28 Ind. App. 89, 62 N. E. 68.

v. Big Rock Irrigation Co.¹²⁰ the court held the objection not well taken; but the question was complicated by certain stipulations. In the course of the decision the court said: "The question here presented has not been considered or decided by this court as far as I have been able to find. Whether the cases cited by appellant were rightly decided under the practice prevailing in those states we need not consider. Obviously, it is one of those questions which should be determined in harmony with the principles governing our own practice. It is true that the individual defendants, having disclaimed all personal interest in the controversy, were not injured by the findings or judgment, and were not 'aggrieved' thereby. But the order granting a new trial, having been rightly made as to one of the defendants—the irrigation district—the plaintiff was not injured by the joinder of the individual defendants in the motion, nor by the granting of the motion as to all, and he should not be permitted to profit by findings which do not accord with the facts which he has stipulated to be true, if it can be avoided. Section 475 of the Code of Civil Procedure provides: 'The court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.' In the face of this provision, appellant's contention cannot be sustained." If the part of section 475 above quoted is given uniform operation whenever the question arises, the objection can seldom be of any value to the objector. A question may arise where there

120 117 Cal. 19, 25, 48 Pac. 908. See, also, *Ex parte Lowman & H. S. P. Co.*, 2 Wash. St. 427, 27 Pac. 232, where it was held that where one of joint defendants had defaulted judgment by default having entered as to him, and judgment was recovered against the others on the trial, it was not error to grant a new trial as to the defendants who had answered and deny it as to the defaulting defendant although the motion may have been made by all the defendants. The court in this case gave express recognition to the general rule in other states, but held the defaulted defendant to be a stranger to the verdict. In Indiana, it was held, that, where upon the face of a pleading it appeared that one of the defendants had no interest in the matter in controversy which the judgment rendered, in any way affected and a motion for new trial was joint as to all defendants, and not being good as to such one defendant it was properly overruled: *Jones v. Peters*, 28 Ind. App. 383, 62 N. E. 1019.

are two or more parties standing in the same relation to the verdict, or other decision, and a motion is made for a new trial by one or more of them, less than all, and he is, or they are, found entitled to a new trial, as to the effect upon the rights of the other parties to the action, of granting a new trial on his or their motion. In *State v. Superior Court of Pierce County*,¹²¹ an application for mandamus was brought by one Holgate, a plaintiff, to compel the superior court to direct and cause to be entered in the journal of said court a personal judgment in favor of the relator against one of two defendants in a case upon a verdict previously rendered in the action. The other features of the case, the decision, and the somewhat novel grounds upon which it was based, are shown in the opinion, which reads in part as follows: "The application and the record show that the relator was plaintiff in an action against defendants, Parker and Kirby, in which action a judgment was obtained in favor of the plaintiff for five hundred dollars. Subsequently, a motion was made for the vacation of the verdict and the granting of a new trial, which motion was sustained by the court, and a new trial ordered. The burden of the relator's complaint is that the notice at the motion for a new trial would be made was given by defendant Kirby alone, and that, inasmuch as defendant Parker did not join in said motion, the setting aside of the verdict and the granting of the motion for a new trial did not affect him, and that he is now entitled to have judgment on the verdict entered against him. The complete record in this case was before this court on appeal, taken by the relator from the action of the court in sustaining the motion to set aside the verdict and grant a new trial in this case. And from the whole record we are inclined to the opinion that the motion for vacation and for a new trial was treated by all the parties and by the court as a motion by the defendants, and not by one defendant alone. And we have uniformly held that we would determine a case here on the theory on which it was tried below. These defendants were represented by the same counsel, and, while the notice of intention to make a motion for a new trial relates that the motion will be made by defendant Kirby, it does not indicate that the mo-

¹²¹ 19 Wash. 114, 115, 52 Pac. 522.

tion will be made in his interest alone, but that the motion will be made to vacate and set aside the verdict rendered in the cause, and the motion itself does not indicate by which defendant it was made, either in the motion or by the signing of the same, for it is simply signed 'Murry & Carroll, Attorneys for Defendant,' and it was the evident intention of the court to vacate this verdict and grant the motion for a new trial in favor of both of the defendants."

§ 373. Objection to sufficiency of notice—How and where to be made.

The approved practice, when it is desired to furnish the opposite party convenient and conclusive evidence that he has performed the acts which, if done in time, would constitute legal service, without losing the benefit of the objection that the service is too late, is to give the written admission with the reservation of that specific objection.¹²² But, though such objection be so reserved, it must be presented at the hearing of the motion, or it will be treated as having been waived.¹²³ But

¹²² *Gumpel v. Castagnetto*, 97 Cal. 15, 31 Pac. 898.

¹²³ *Frost v. Meetz*, 52 Cal. 664; *Territory v. Rehberg*, 6 Mont. 467, 13 Pac. 132. In the first case above the court said: "The statement and bill of exceptions on motion for a new trial were settled by the judge of the court below on the ninth day of February, 1876, and on the 31st of March following the motion for a new trial was denied. It is now contended by the respondent that the right to move for a new trial in the court below had been lost, by a failure to give the required preliminary notice of intention to move for such a new trial. But we think that this objection is not open to the respondent. The statement as settled sets forth that the defendant had given the notice. 'And the defendant Meetz having given notice of his intention to move for a new trial,' etc., and by this will be intended a notice given in due time and form. Nor is the position of the respondent upon this point aided by a resort to the affidavits found in the printed transcript on file here. For if those affidavits be taken to be part of the record on this appeal, there is found the uncontradicted allegation by the counsel for appellant, that the respondent appeared at the settlement of the statement, proposed amendments thereto, and did not then allege the want of proper notice of intention to move for a new trial, nor object to the settlement of the statement on that ground. The decision denying the motion for a new trial, made below, does not appear to have proceeded upon the supposed want of notice of intention, but upon

there is a distinction to be noted herein between the failure to serve in proper time, and fatal defects in matters of substance appearing on the face of the notice. And it was held, accordingly, that the mere appearance of respondent's counsel did not amount to a waiver of defects apparent in the notice, and that, in the absence of anything in the record showing a waiver thereof, an appeal from an order denying a motion for new trial, based upon such defects, would be dismissed.¹²⁴

§ 374. Restriction of motion to particular issues.

It is apparently well settled that a party may, by so framing his notice of intention, or other moving paper, restrict the motion and the court's order thereon to a single issue in the case

the determination of the questions presented by the motion itself. The intendment to be indulged here, therefore, is that the court below found that the respondent had waived the objection."

¹²⁴ Gregg v. Garrett, 13 Mont. 10, 31 Pac. 721. In this case the court said: "The notice is incomplete and defective, in not setting forth, as required by statute, the basis upon which plaintiff proposed to present the motion for new trial. The reason and importance of this requirement are apparent. Both parties have a right to know upon what papers the motion will be presented, and to participate in preparing the record, if the same has not already been made up by way of bills of exception. The defect in the notice of intention in this case is held to be ground for dismissal, unless the adverse party has waived the same by stipulation, or by co-operation in the formation of the papers upon which the motion is to be made, by amendment, or by some other act which constitutes a waiver. . . . Appellants' counsel insists that the appearance by counsel for respondent when the motion is heard amounts to a waiver of the defects apparent in the notice. The record in this case can only be construed to show that respondent's counsel appeared when the motion was submitted to the court. We think it would be going too far to hold that this was a waiver of the omission to give a proper notice according to the plain directions of the statute. Appellant's counsel also contends that respondent should have caused the record to show that he took advantage of the defect in the notice on the hearing of the motion in the court below. At most, that would have been placing in the record mere argumentative matter. The defect taken advantage of is apparent in the notice itself, and requires no other matter inserted in the record to show this fact. This irregularity in presenting the motion, without stipulation or other action amounting to a waiver of proper notice, may have been the very ground upon which the trial court denied the motion. And we think, in

that has been tried, provided that it be separable; that is, not so blended as to render its separate trial impracticable. The principle is founded upon the long settled practice of granting new trial as to part only of the issues where the motion has been general, leaving the others undisturbed. Appellate courts have frequently remanded causes with directions to the trial court to find upon a single issue, leaving the other findings to remain a part of the record. Trial courts exercise the same power in this respect before appeal to limit the scope of the retrial; and it follows, upon principle, that, if the courts freely exercise the power, the party seeking a new trial may elect to seek it upon a single issue, leaving the court to determine whether his election has been properly made. The right of the movant to do this was squarely presented and decided in *San Diego Land etc. Co. v. Neale*,¹²⁵ where the plaintiff moved for a new trial as to the issue concerning the value of the land sought to be taken, but as to no other issue, and appealed from an order denying his motion. In the supreme court, the defendant made a preliminary objection that a party could not move for a new trial as to a part of the issues. The court, in deciding against the defendant on this point said: "So far as we are advised, this precise question has not been decided in this state. But, upon principle, and according to the analogies of existing rules, we think that the objection is not well taken. There is nothing in the code either expressly forbidding or expressly authorizing such a course. The implication from the language, however, tends to sanction it. The definition of a new trial is as follows: 'A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court or by referees.' Now, as the lawmakers cannot be supposed to have thought that the majority of cases involved only one issue of fact, there is, perhaps, some implication that they intended that there might be such a thing as a new trial of a single issue, whether there were other issues or not. There

the absence of anything in the record showing a waiver, the objection by respondent should be sustained": See, also, *White v. Superior Court*, 72 Cal. 475, 14 Pac. 87; *Bear River etc. Min. Co. v. Bowles*, 24 Cal. 354; *Fabian v. Callahan*, 56 Cal. 100.

¹²⁵ 78 Cal. 63, 20 Pac. 372.

is, at least, no implication to the contrary. The analogies of other provisions and previous decisions support the view that there may be a new trial as to a part of the issues. . . . The cases which hold that a motion for a new trial is premature, if made before all the material issues are disposed of, are not in conflict with our conclusion, for, in the case before us, all the material issues were disposed of before the motion was made. We see no inconvenience that can result from the practice. The time to move as to the remaining issues would not be extended by a motion as to a part; and the party would lose his right to attack the findings as to the remaining issues, unless the time should be extended, which could only be for a short period, without the consent of the parties. And this being so, the result would simply be the elimination of a part of the controversy, which is not in itself undesirable." It had been previously decided in Nevada, in accordance with the views expressed in the above quotation.¹²⁶ Subsequently, in a Montana case,¹²⁷ though the question was not identical. Yet, the above cases were cited and approved, and, from the reasoning employed, it is evident that the practice of directing the proceeding at one of several material issues decided, without seeking to disturb the finding or verdict as to others, would be approved. The same precise question, decided in the California case above cited, has not subsequently come before the court. But the power of the lower court, upon general motion to limit the retrial to certain issues, allowing the decision to stand as to the others, has been uniformly conceded.¹²⁸ The power of the moving party to thus restrict the scope of a retrial is denied in at least one state, upon the ground that the exercise of such power is the

¹²⁶ *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74. In this case the reasoning of the court, per Leonard, J., is very convincing in favor of the right of the moving party to limit his motion to part of the issues. See pages, 371 to 379, reviewing the authorities.

¹²⁷ *Ransdell v. Clark*, 20 Mont. 103, 106, 49 Pac. 591, holding that the court may grant a new trial as to one or more separate causes of action included and tried in the same suit, where this can be done readily and without confusion resulting upon the retrial.

¹²⁸ *Duff v. Duff*, 101 Cal. 1, 4, 35 Pac. 437; *Mountain Tunnel Co. v. Bryan*, 111 Cal. 36, 38, 43 Pac. 410, but holding the order of the court defining the issues so indefinite as to necessitate the remanding of the entire case for a new trial.

peculiar province of the court, which parties cannot thus control.¹²⁹ It will be seen, upon examination of these authorities, that the right to proceed for a new trial upon one or more, less than all, the issues depends upon the question whether each such selected issue is so distinct as to warrant its consideration apart from those the decision upon which it is not desired to disturb. A mistake herein might be of serious consequence; for, if the court should, after such election, and when it is too late to give notice as to other issues, decide contrary to the opinion of the movant, it could not order a new trial, either as to the selected issue, or as to all the issues.¹³⁰

**§ 375. Waiver of notice of intention or of the motion—
Waiver of defects.**

There are several nice distinctions to be observed with reference to the subject of waiver, as it relates to the notice of intention.¹³¹ The questions which arise may relate to an alleged waiver of notice, or of service of notice within proper time, or of defects apparent upon the face of a notice properly served in due time. With reference to both the first two questions, the objection must be raised at the hearing, and cannot be made available on appeal, unless a question is so raised and ruled upon by the trial court, and a record of the matter preserved for review. Any facts alleged by the movant to constitute a waiver, in response to the objection, should also be made to fully appear. The notice not being one of the papers designated as part of the record on appeal, and since it constitutes no part of the statement on motion for new trial, it will be presumed, unless made to appear to the contrary, that whatever was necessary to give the trial court jurisdiction of the motion was done.¹³² This is all true as to defects in the notice where the notice states that the motion is to be made upon a statement, or bill of exceptions, with or without affidavits, because, at the hearing, these contain the specifications of errors

¹²⁹ Nathan v. Charlotte St. Ry. Co., 118 N. C. 1066, 24 S. E. 511.

¹³⁰ As to requisites of order for new trial as to part only of issues, see post, §§ 394-396, 399.

¹³¹ The decisions on this question are applicable whether a notice of intention or a notice of motion be the proper practice.

¹³² For a full discussion of these propositions, see post, § 687.

and insufficiency of evidence, and supersede the notice. But, while the fact that the service of a notice of a motion on the minutes was after the time limited by law may be waived, and while the presumption exists that it was served in time prevails, unless the contrary be shown by the record, the record must show the existence and contents of such a notice, because otherwise the record would contain none of the specifications which are required to give the court jurisdiction.

Defects, not of substance, but of form, may be waived; while substantial defects cannot; and the failure to file and serve the notice in proper time may be waived in various ways.¹³³

§ 376. Amendment of notice.

Efforts to amend notices or motions after the expiration of the time for serving and filing them have usually proven unsuccessful, especially where it was sought to amend them in essential parts. Thus, where a notice of motion for a new trial stated that the motion would be made upon the minutes of the court, and upon the grounds, among others, of errors of law oc-

¹³³ See *O'Connell v. Main & Tenth Sts. Hotel Co.*, 90 Cal. 515, 27 Pac. 373, waiver of defect of form; *Hamilton v. Dooly*, 15 Utah, 280, 49 Pac. 769, waiver of defects; *State v. Whaley*, 16 Mont. 574, 41 Pac. 852 holding that failure of a notice of intention to move for a new trial to specify the particular errors relied upon is not waived by a motion to strike it out upon other grounds; *State v. Pilgrim*, 17 Mont. 311, 42 Pac. 856 holding that failure of a notice of intention to move for a new trial to particularly state the errors relied on is not waived by the special appearance of counsel for the purpose of a motion to dismiss the motion for a new trial for that reasons; *Hughes v. Alsip*, 112 Cal. 587, 44 Pac. 1027 holding a defect in the notice of a motion for a new trial in not stating upon what the motion would be based, is not waived by the proposal of amendments to a bill of exceptions, nor by participation in the settlement of such bill, as appellant is entitled to use a bill of exceptions upon appeal from the judgment, regardless of the motion for new trial. For instances of waiver of notice in due time, see *Hobbs v. Duff*, 43 Cal. 485, waiver by filing amendments to, and agreeing to settlement of statement without objection on the ground of notice not being served in time; *Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642, to same effect; *Brundage v. Adams*, 41 Cal. 619, proposing amendments to statement without reserving objection that notice not served in time; *Williams v. Gregory*, 9 Cal. 76, filing counter-affidavit.

curing at the trial and excepted to, but the notice failed to specify the particular errors relied upon, it was held, that the notice was radically defective, and that an order of the court, upon motion by the moving party, granting leave to amend the notice after the expiration of the statutory time for its filing, by adding the required specifications, upon the ground of inadvertence, was without jurisdiction.¹³⁴ So, where a notice of motion for a new trial designates that the motion will be made for all the causes specified in section 657 of the Code of Civil Procedure, upon the statement of the case, the moving party is bound to prepare and serve his proposed statement within the time allowed by law for that purpose. A failure so to do is a waiver of the right to move for a new trial, and, after the statutory time for giving the notice has passed, the trial court has no jurisdiction to allow the original notice to be amended, so as to designate that the motion would be made for the same causes upon the minutes of the court.¹³⁵ And where a defendant in a criminal prosecution submitted a motion for a new trial, which was denied, and judgment was thereupon pronounced, a motion thereafter made to amend the motion for a new trial, by adding the ground of newly discovered evidence, was held too late.¹³⁶ At any rate, a new specification cannot be introduced by amendment.¹³⁷ The reason for not permitting

134 *Packer v. Doray*, 98 Cal. 315, 33 Pac. 118. To same effect, *Little v. Jacks*, 67 Cal. 165, 7 Pac. 449; *Neale v. Depot Ry. Co.*, 94 Cal. 425, 29 Pac. 954; *State v. Mason*, 18 Mont. 362, 45 Pac. 557; *Sullivan v. Helena*, 10 Mont. 134, 25 Pac. 94; *McCune v. Missoula*, 10 Mont. 147, 25 Pac. 442; *Perry v. Eaves*, 4 Kan. App. 26, 45 Pac. 718; *State v. Hunt*, 141 Mo. 626, 43 S. W. 389; *Preble v. Bates*, 37 Fed. 772. Held, that a motion filed within proper time may be amended so as to include an additional ground of which the moving party was ignorant when the original motion was filed: *Seagrave v. Hall*. (C. C.), 3 Ohio Dec. 221. See, also, *Kentucky Cent. Ry. Co. v. Smith*, 93 Ky. 449, 20 S. W. 392.

135 *Cooney v. Furlong*, 66 Cal. 520, 6 Pac. 388.

136 *People v. Wessel*, 98 Cal. 352, 33 Pac. 216. To same effect, *State v. Mason*, 18 Mont. 362, 45 Pac. 557.

137 *State v. Mason*, 18 Mont. 362, 365, 44 Pac. 557. In this case the court said: "The next question is whether this amended notice is good as an amendment. But it does not amend any specification which was contained in the former notice. It does make a specifica-

such amendments was given in a case where the defendant had been permitted by the trial court to file an amended notice, and insert a new specification of error, after the time of service had expired as follows: "Appeals are matters of statutory regulation. There must be a substantial compliance with the statute, in order to confer jurisdiction upon the appellate court. The appellant is charged with the duty of perfecting his appeal in the manner provided by law, and error in this regard affects the jurisdiction of the appellate court."¹³⁸ But the prevailing view is not universal. In a comparatively recent case, the supreme court of South Dakota, under a statute¹³⁹ providing that when a proceeding fails to conform to the code, the court may, in its discretion, permit an amendment, and another statute,¹⁴⁰ providing that the court may, on good cause shown in

tion which seems to be good; for it states that the court erred in refusing to give an instruction as requested by counsel for defendant, which instruction so refused was the same as the instruction given, and numbered thirty, except that the words 'beyond a reasonable doubt' were contained in the offered instruction, but were stricken out of that as given. But the general notice of intention to move for a new trial did not pretend to specify any error as to instruction 30, or any error whatever as to refusing any instruction. The amended notice did not amend anything whatever that was contained in the original one. It introduced a wholly new specification. If it had been an amendment to anything contained in the original notice, or if it had specified properly, and also clearly, anything that was insufficiently specified in the first, we would have before us another question; but, as the matter stands, it appears to us that the amendment seeks to make a specification entirely new, and which is unsupported by anything in the original notice": See, also, *Gillespie v. Dion*, 18 Mont. 183, 44 Pac. 954, which was an election contest; *Barber v. Briscoe*, 8 Mont. 214, 19 Pac. 589.

¹³⁸ *Territory v. Hanna*, 5 Mont. 247, 5 Pac. 250, cited and followed in *State v. Mason*, 18 Mont. 362, 365, 45 Pac. 557. To same effect, *Gumpel v. Castagnetto*, 97 Cal. 15, 31 Pac. 898; *State v. McDaniel*, 39 Or. 161, 65 Pac. 520; *Hall v. Harris*, 1 S. Dak. 279, 36 Am. St. Rep. 730, 46 N. W. 931; *Dutton v. Seevers*, 89 Iowa, 302, 56 N. W. 398, holding that an amendment to a motion for a new trial, alleging failure of the court to instruct touching the burden of proof, where the original motion alleged error in the instructions generally, is in effect a new motion, and it must be filed within the time allowed by the statute for filing a motion for new trial.

¹³⁹ South Dakota Comp. Laws, § 4939.

¹⁴⁰ South Dakota Comp. Laws, § 5093.

furtherance of justice, extend the time within which acts may be done, held that the court had power, on the hearing of the motion for new trial, to permit an amendment to the notice of motion, after the time for giving such notice had expired.¹⁴¹

§ 377. Effect of statutes upon proceeding previously commenced.

The question of the power of the legislature to pass laws affecting pending proceedings for new trial presents no different question from that presented by ordinary practice acts, code provisions and amendments to laws governing the methods of procedure in actions and criminal prosecutions. Certainly, no right which has become vested can be disturbed by such statutes, even though it be a right resulting from an act done by authority of a practice act; but the mere fact that an action or proceeding has been already instituted does not debar the legislature of the power to change the manner in which future steps therein shall be taken, or in which the remedy shall be administered. Accordingly, it was held in *Kelly v. Larkin*,¹⁴² that, inasmuch as a proceeding to obtain a new trial is not initiated until the notice of the motion is served and filed, the proceeding in that case should have been conducted in accordance with the Code of Civil Procedure, which took effect prior to the filing and service of the notice of the motion, although the judgment was rendered prior to its taking effect. The whole subject is lucidly covered in a single paragraph by Bach, J., in *Gassert v. Bogk*,¹⁴³ as follows: "It has been held that an amendment to the laws governing procedure applies to actions pend-

¹⁴¹ *Bunker v. Taylor*, 10 S. Dak. 526, 74 N. W. 450. In *Houston v. Kidwell*, 83 Ky. 301, it was held that courts had discretionary power to allow additional grounds to be filed after the time limited, a motion having been filed in time; but this view seems not to have prevailed in a later case: See *Kentucky Cent. Ry. Co. v. Smith*, 93 Ky. 449, 20 S. W. 392.

¹⁴² 47 Cal. 58. Followed in *Hodgdon v. Griffin*, 56 Cal. 610.

¹⁴³ 7 Mont. 585, 601, 19 Pac. 281. See *Poujade v. Ryan*, 21 Nev. 450, 33 Pac. 659, holding amendment to Practice Act not retroactive, and that it did not apply to a case where the motion for a new trial had been heard and disposed of by the lower court before its enactment.

ing as well as to actions commenced thereafter, so far as the amendment alters the practice in any step yet to be taken; thus, changes in the procedure on motion for a new trial, and changes in the manner of taking an appeal, apply to actions pending, where these steps in such actions have not already been taken, as well as to actions commenced thereafter; but such changes do not govern the practice where the motion for a new trial has already been made, or where the appeal has already been taken. The hardship which would result from a contrary interpretation would be apparent if some succeeding legislature should amend the present law regarding exceptions to instructions, by enacting that an exception must be taken to instructions granted, to which objection is sought to be taken, and that the exception must state specifically the grounds of the objection. If the rule of interpretation contended for by appellant be correct, and if such a law should be passed, every litigant who has relied upon the law passed by the last legislature above referred to would be without remedy against erroneous instructions."

This seems the proper place to refer to a case wherein a statute was held constitutional which granted a new trial after, according to the general practice act existing at the time, the time had elapsed for initiating the proceeding. The action was against the state, and the act in question permitted the court in which the judgment had been recovered to reopen it and grant the plaintiff (suing the state) a new trial. The statute was upheld on the ground that it merely amounted to consent of the state to a hearing of the motion; in other words, a waiver of the right to object on the ground of the lapse of time.¹⁴⁴

¹⁴⁴ *People v. Frisbie*, 26 Cal. 135.

CHAPTER 19.

HEARING AND DISPOSAL OF MOTION.

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- § 408. Knowledge of court, how made available on motion.
- § 409. Disqualification of jurors as witnesses at hearing.
- § 410. Of the production of evidence at hearing.
- § 411. Of hearing before judge other than that trying the case.
- § 412. Several new trials in same case.

§ 378. Meaning of and necessity for hearing.

The statutes on the subject of new trial contain little to indicate what is meant by "hearing" of the motion; and yet the omission of any reference to the method of conducting the proceeding in open court is of no significance.¹ The language employed in section 660 of the California Code of Civil Procedure—and a similar provision will be found in other states—clearly indicates that there should be a hearing, and it was probably thought that no definition or prescription was needed.

Perhaps, in theory, the law contemplates a formal examination of the issues made by the notice, motion and specifications in open court conducted by counsel; but it is common knowledge with the profession that often the motion is disposed of in a summary manner, the movant having little hope of bringing about a different result upon review by the trial court, but relying mainly upon a review in the appellate court. The theory, however, of an actual and formal hearing cannot be entirely ignored. The section above referred to provides for bringing on the hearing and states that "on such hearing" reference may be had to certain records, files and papers. Perhaps, however, a hearing would be presumed to have been had from the pres-

¹ See *Finn v. Spagnoli*, 67 Cal. 330, 7 Pac. 746, holding that hearing and disposition of motion for new trial is a trial within the meaning of section 398 of the Code of Civil Procedure relating to the transfer of a cause for disqualification of a judge. "When a court hears and determines any issue of fact or of law for the purpose of determining the rights of the parties, it may be considered a trial": *Tregambo v. Comanchi M. & M. Co.*, 57 Cal. 505.

ence in the record, on appeal, of a formal order disposing of the motion, nothing appearing to the contrary.²

It was held, under the old Practice Act, that even though the statement had been settled, engrossed, and certified, and filed as correct, the court should not pass on the motion for a new trial until it had been submitted for decision, and the parties afforded an opportunity to be heard, if desired.³ In another case, it was held error to grant the motion without any formal or actual submission and without notice to the adverse party, thus affording him an opportunity to be heard.⁴

² See *Carpenter v. Superior Court*, 75 Cal. 596, 598, 19 Pac. 174, where it is said, with reference to such an order made without a hearing that, "such a state of things being of rare occurrence, is not presumed, but must be affirmatively shown."

³ *Morris v. DeCelis*, 41 Cal. 331.

⁴ *De Gaze v. Lynch*, 42 Cal. 363. For remedies of party denied a hearing see next section. A party will not be deemed to have waived the points in a motion for a new trial not read to the court, or commented upon provided he has not in some manner deceived the trial court, or otherwise waived such points: *World's Columbian Ex. v. Bell*, 76 Ill. App. 591. It is no less a wrong to the party against whom a motion for new trial is granted to grant it without notice and without hearing than to deny it in the same way. That was done in *De Gaze v. Lynch*, supra. The court in reversing the order for this error said: "This statement appears to have been settled, and certified by the judge as correct, on the twelfth day of May, 1870. On the following day, 13th of May, defendants duly notified the plaintiff that upon his statement on file, and upon the files, papers, and records in the action, they will move the court, at the courtroom thereof on the sixteenth day of May, 1870, at the opening of the court on that day, or as soon thereafter as counsel could be heard, for a new trial in said cause, so far as the same relates to defendants, Mott, King, and Burns. The record discloses no further action upon the motion until the second day of June, 1870, when, in open court, a motion for a new trial in another case was overruled by the court, whereupon the counsel for plaintiff in this case called up the motion for a new trial therein, and stated that this motion was of similar character to that just decided; he supposed it would be useless to argue the same; but the counsel for the defendants objected to a submission of the motion without argument, 'when the court stated substantially, that it did not see how it could consistently grant a new trial in this case.' whereupon counsel for defendants insisted upon being heard on the motion, to which the court replied, that counsel could take their own course. No argument was, however,

Owing to the statutory character of the jurisdiction, there is no such thing as a pro forma ruling on the motion.⁵ Therefore, where a motion for new trial had been by a proper order set for hearing on a certain day, it was held that the court had no power to call it up on an earlier day and dispose of it, without the movant's consent, although his time for filing a brief of evidence (statement) had already expired.⁶

Argument is not usually regarded as an essential element of a trial. That depends, however, somewhat upon the character

then had, and nothing further was done by either party to the motion, but the court, without notice to either party, and without any formal or actual submission of the motion to the court for decision, on the ninth day of June, made and caused to be entered his order granting a new trial, which fact was not brought to the knowledge of plaintiff until about six weeks thereafter; whereupon plaintiff's counsel, upon his own affidavit and certain minutes of the court, moved the court to set aside and vacate its order of June 9th, granting defendant's motion for a new trial, substantially on the ground that the motion for a new trial had never been submitted to the court for its decision; that plaintiff had never had any notice of any such submission, and had not had an opportunity of being heard in opposition to the motion. Upon the hearing of this motion to set aside and vacate, on the fifth of August the court denied the same. From this exhibit of the record it is apparent that the order of the court below granting defendant's motion for a new trial was prematurely and improvidently made." And in *Sweeny v. Great Falls etc. Ry. Co.*, 11 Mont. 34, 36, 20 Pac. 347, the court said: "It appears that the respondent made objections to the time of serving the statement on motion for a new trial, and to the hearing of the motion. The court wholly refused to hear the motion. This was not the proper practice." So in *Quivey v. Gambert*, 32 Cal. 304, 309, the court said: "A party moving for a new trial is entitled to a ruling upon his motion upon the basis upon which he presents it, in order that he may have and enjoy unembarrassed his right of appeal to this court. If his notice or statement has not been served or filed within time, that is a good reason why his motion should be denied when finally brought to a hearing, but under the method of procedure prescribed by the code, it is not intended that the record upon which the motion is made may be first stricken out and the motion then denied. Such a course is in effect a denial of any hearing upon the motion and of an appeal to this court in a case where an appeal is given": See, also, *Lucas v. Marysville*, 44 Cal. 212; *Gumpel v. Castagnetto*, 97 Cal. 16, 31 Pac. 898.

⁵ *Ranney v. St. Johnsbury & L. C. R. Co.*, 67 Vt. 594, 32 Atl. 810.

⁶ *Woolf v. State*, 104 Ga. 535, 30 S. E. 796.

of the issue. Where it was shown on appeal that a trial court refused to hear any argument on a motion for a new trial of a case tried by a jury on conflicting oral testimony, and overruled the motion, and entered judgment on the verdict, the judgment was reversed without inquiry into its merits.⁷ But usually that alone would not be held sufficient to warrant a new trial.

It seems that, in Illinois, the argument of the motion by the movant is considered of considerable importance, as bearing upon his rights in the appellate court. And it was held that, on failure to argue a motion for a new trial, the action of the court, in overruling the motion, would not be reviewed.⁸

Other courts incline to the view that some showing of prejudice must be made to warrant interference by the appellate court on the mere ground of the absence of a showing that the motion was argued. Accordingly, it was held that the court might, in its discretion, refuse to hear argument on the motion, where the views and authorities of counsel had been fully presented during the trial.⁹ But any inconsistency between the cases holding a party entitled to a hearing, and other cases holding that the movant is not entitled to notice of the taking up and disposal of the motion is only apparent.

§ 379. Remedies for denial of right to be heard.

There are two ways in which parties may be deprived of a hearing on a disposal of the proceeding in the lower court. It is usually to the interest of both parties to have the statutory requirement of a speedy determination complied with. The court may deprive them of this right by refusing to hear the motion or to set it for hearing after the proper steps have been taken to bring on the hearing. In that case, either party

⁷ *Atchison etc. R. Co. v. Consolidated Cattle Co.*, 59 Kan. 111, 52 Pac. 71. It is difficult to see how such abuse of discretion could be presented on appeal from the judgment, where the motion for new trial proceeds independently, upon its own record.

⁸ *Calumet Furniture Co. v. Reinhold*, 51 Ill. App. 323.

⁹ *Frank v. State*, 94 Wis. 211, 68 N. W. 657. See, also, *Manning v. State*, 79 Wis. 178, 48 N. W. 209.

is entitled to enforce his right to a hearing by resort to mandamus. The other way is by deciding the motion prematurely.¹⁰ The remedy for deciding the motion prematurely, or without notice is neither so speedy nor effective as in the other case. It is obvious that, as the parties are equally entitled to a hearing, they are equally entitled to redress for a determination without a hearing. The only remedy is by motion under the statute as for an order inadvertently made, supported by affidavits. An appeal from the order denying the motion for a new trial will afford no specific relief—that is to say, it would not remedy the wrong of denying a hearing, although it would still afford a review of the action of the trial court in granting or denying the motion, unless such order were made before completion of the record to be used on the motion. Under the condition just supposed, the remedy here named is circuitous and dilatory to a great degree. If the court denied the motion to set aside its order, the party aggrieved must appeal from the order of denial. But, if he were the movant in the proceeding for new trial, he would not necessarily have to wait for a disposal of his appeal. He could proceed with the completion of the record to be used on the motion, and could, if necessary, enforce each step by mandamus to the point of a hearing and could resort to it to compel a hearing on the completed record. In the face of the record thus made, nothing by way of legal defense to the application for the writ could be shown. The propriety of the motion above described was established in *Morris v. De Celis*.¹¹ An order was made, granting a new trial

¹⁰ See *State v. Stratton* 110 Mo. 426, 19 S. W. 803. In *Sweeney v. Railroad Co.*, 11 Mont. 34, 27 Pac. 347, it was held that an appeal would lie from an order of the trial court refusing to hear the motion. But as an appeal is an inadequate remedy, it is no bar to mandamus.

¹¹ 41 Cal. 331, cited and approved in *De Gaze v. Lynch*, 42 Cal. 363; *Thomas v. Sullivan*, 11 Nev. 280. Doctrine of the case named in text affirmed, but held inapplicable in *Crosby v. North Bonanza Min Co.*, 23 Nev. 70, 42 Pac. 583. See *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605. In this case the movant appealed from the order prematurely made denying his motion for a new trial and the supreme court reversed the order, and remanded the case for further proceedings. The lower court had, however, after the premature order had been appealed from, set aside said order of its own motion, and settled

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after settlement, but before engrossment of the statement. A new trial was granted, and the opposition party in the proceeding applied by motion, supported by affidavits, to have the order set aside. Upon a denial of his application, he took appeals from both orders. In passing upon the appeals from the orders, Justice Wallace, delivering the opinion of the court, said: "Even in view of what is recited in the order of September 5th, it is clear enough that the motion for a new trial itself had never been submitted to the court for decision; and, even if the court had, in the meantime, not only settled the statement, but had engrossed it, and certified and filed it as a correct statement, it should not have undertaken to determine the motion until that motion had been first submitted for decision, and the parties afforded an opportunity to be heard on the motion, if desired. The practice here pursued operated as a complete surprise upon the defendant, and, if countenanced, would be utterly subversive of the rights of parties litigant. It is ordered that the order of the court below, denying the motion of the defendants to set aside the order granting a new trial, be reversed, and that the cause be remanded, with instructions to sustain said motion of the defendant, and for further proceedings for the orderly determination of plaintiff's motion for a new trial."

But a party may deprive himself of any remedy by motion to set aside the order by agreeing to a premature submission of the motion. In *Crosby v. North Bonanza Mining Co.*,¹² a motion for new trial was submitted upon a written stipulation before the statement upon which it was submitted had been settled. After the motion had been denied, as it must have been, the moving party applied to have the order set aside, and took an appeal from the order denying the latter motion, but made no showing of inadvertence. The order was affirmed. But that case is clearly distinguishable from *Thomas v. Sullivan*,¹³ in which a principle is declared apparently in conflict with the proposition that a motion to set aside the order on the

and certified the statement, thus keeping alive the proceeding for new trial.

¹² 23 Nev. 70, 42 Pac. 583.

¹³ 11 Nev. 280, 284.

motion for new trial is necessary. But it is really not in conflict, but rather establishes an exception to such rule, the exception consisting in the fact that the inadvertence was apparent on the record on appeal from the order granting a new trial, without any motion to set it aside. The stipulation and its terms were in the record. Moreover, it was the inadvertence of the judge, neither party being at fault, the inadvertence not being discovered until after an appeal from the order had been perfected. The motion and the uncertified, but settled, statement were submitted to the district judge with the understanding that he should attach his certificate and decide the motion. He decided the motion, but neglected to sign or certify to the statement. Justice Beatty, delivering the opinion, indicated the proper course under such circumstances, and concluded as follows: "But the district judge, through inadvertence, decided the motion first, and, before the defendants discovered and had time to remedy the inadvertence, the plaintiff took and perfected his appeal, and now claims that he has, by that means, forever deprived the respondents of any opportunity of having their motion decided upon its merits. We think that, if the facts are as suggested, he is mistaken in that view. We must undoubtedly reverse the order of the district court, but we only reverse that order. If there is, nevertheless, a motion for a new trial regularly pending, and if that motion has never been decided in accordance with the terms of its submission, there is nothing to prevent the district judge from now settling and certifying the statement and then deciding the motion upon its merits."

§ 380. Respective powers of court and counsel in bringing on the hearing.

Section 660 of the California Code of Civil Procedure provides that the motion "may be brought to a hearing upon motion of either party." The bringing of the motion to a hearing should be according to some approved and regular method of procedure, and should be held to imply, or include, notice to the opposite party. But the moving party in a proceeding for a new trial maintains his status as such throughout. He is allowed a reasonable time after the engrossment and filing of the statement or bill of exceptions, or filing and serving of all affidavits, or the expiration of time for it, to take the next

step. During such reasonable period, if the opposition desires to bring on the hearing, he must afford the movant an opportunity to be heard, or to ask for a postponement of the hearing, if so advised. But, while the opposition may, yet he is not bound to, bring on the hearing at all. He may remain passive until the movant has permitted a reasonable period to elapse without action, and then move to dismiss as for abandonment.¹⁴ The notice for this purpose may be made to have an alternative effect—either to secure a dismissal of the proceeding or a hearing on its merits.

In some jurisdictions, the motion is required to be in writing, and to accompany the motion, but, in California, Utah and other states which have adopted the notice of intention in lieu of the notice of motion, the notice of intention stands for the formal motion, and the questions may be ruled upon, though no motion *eo nomine* be filed.¹⁵ And even where a notice of motion is required to be filed and served, it is held that no formal written application at the hearing is necessary.¹⁶

§ 381. Proper order for disposal of motions in arrest and for new trial—Same and judgment non obstante.

In all jurisdictions in which new trial is independent of the

¹⁴ It was otherwise prior to the Code of Civil Procedure: *Griffith v. Grauer*, 47 Cal. 644. That party filing motion is not entitled to notice of hearing, see *Shafer v. Hewitt*, 6 Colo. App. 374, 41 Pac. 509. *Burnham v. Spokane Mer. Co.*, 18 Wash. 207, 51 Pac. 363. That party responsible for delay cannot complain of delay, see *Smidt v. Third Jud. Dist. Ct.*, 23 Utah, 302, 64 Pac. 869. Time for hearing and decision, see *Pearce v. Strickler*, 9 N. M. 46, 49 Pac. 727.

¹⁵ *East v. Mooney*, 7 Utah, 414, 27 Pac. 4; *Burlock v. Shupe*, 5 Utah, 428, 17 Pac. 19. See, also, *Callanan v. Lewis*, 79 Iowa, 452, 44 N. W. 892.

¹⁶ *Rutherford v. Talent*, 6 Mont. 112, 9 Pac. 886. In this case the court said: "If the notice designates the grounds upon which the motion for a new trial can be based, it is not necessary to make a formal, written motion, repeating the errors assigned in the notice. A motion is an application for an order. If this notice is what the law requires, and has been duly served on the adverse party, no formal, written application, in addition to the notice, is necessary in order to bring the motion for a new trial to a hearing. The notice is the only written motion required by the statute, and we know of no rule of court requiring such motion to be in writing."

main case, proceeding on its own record, the pendency of motions in arrest, for judgment non obstante, and the like, do not, in any manner, interfere with it, and the order of precedence is immaterial. But it is otherwise where the motion for new trial must be disposed of before the entry of judgment. And where a party is entitled to judgment non obstante, which may be granted at the hearing of his motion for new trial, he should ask for that relief also in his moving papers.¹⁷ Where, however, motions for new trial and for judgment non obstante are pending at the same time, the former may be withdrawn for the purpose of having the latter heard and determined, without such withdrawal being considered an abandonment or loss of the right to a new trial.¹⁸ And where the record shows that a motion in arrest of judgment and one for a new trial were made and acted on the same day, it will be presumed that they were in proper order, and that the right to move for a new trial was not waived.¹⁹

§ 382. Proper practice on abandonment of the proceeding.

At the hearing of the motion, either or both of two preliminary questions may be raised by the opposition, and require to be disposed of before considering the merits. It may be objected that there has been unreasonable delay in the prosecution of the motion, though there has been no lapse or default as regards any preceding step in the proceeding.²⁰ It is possible

¹⁷ *Kernan v. St. Paul City Ry. Co.*, 64 Minn. 312, 67 N. W. 71.

¹⁸ *Stein v. Chicago etc. Ry. Co.*, 41 Ill. App. 38.

¹⁹ *Water & Imp. Co. v. Gildersleeve*, 4 N. Mex. 171, 16 Pac. 278. Filing of motion for new trial on behalf of defendant is not a concession that, unless a new trial be granted, plaintiff is entitled to judgment non obstante on a motion previously filed by him: *Cincinnati, I St. L. & C. Ry. Co. v. Graimes*, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421.

²⁰ *Mahoney v. Wilson*, 15 Cal. 42. In an able opinion in this case on petition for rehearing, Chief Justice Field said: "The failure to prosecute in such a case is an abandonment of the motion. It would devolve upon the court an unreasonable amount of labor to go all through a long record to ascertain whether the referee had not committed some error to the prejudice of the party moving. The party should prosecute this motion like every other motion or proceeding, and not devolve upon the court his own duties or those of his at-

that unreasonable delay in prosecution of the motion may occur in the case of a motion to be made upon the minutes alone; but usually, the delay occurs where the motion is noticed on a statement or bill of exceptions or upon affidavits, or upon one of the former and the latter, and subsequently, to the completion of the record on the motion.

The question of what constitutes laches, or delay, warranting an inference of abandonment of the motion is, in each case, one almost entirely for the determination, or, as usually expressed, within the discretion, of the trial court, depending in great degree upon various circumstances surrounding the parties and conduct of the cause.²¹

The first natural inquiry would be as to what constitutes abandonment of the motion; but, no definition, which would be of any practical value, can be given, for the reason just stated. The decisions are to the effect that unexplained failure to act within certain periods, or that certain acts or admissions did, or did not, constitute an abandonment according to circumstances, but such illustrations are of but little value in

torneys. The motion for a new trial is an affirmative proceeding, the burden of maintaining the propriety of granting which is cast upon the party moving; and there is no more reason why the moving party should not attend, in such a case, by himself or counsel upon the court when the motion is brought up for hearing, than there is that a plaintiff should be absent when his case is first called, and expect, if it be dismissed, to avail himself of errors he may assign on appeal. Having abandoned his motion by his own default, the defendant cannot bring the merits of the motion here by appeal.”

21 *Jones v. Singleton*, 45 Cal. 92; *Baggs v. Clark*, 37 Cal. 236; *Burlock v. Shupe*, 5 Utah, 434, 17 Pac. 19. In *Jones v. Singleton*, *supra*, the court said: “As to the question of diligence involved in the application, it having been determined in favor of the defendants by the trial court in granting the application, it would require a clear case of the absence of reasonable diligence to be shown by the record before we would deem it our duty to disturb the conclusion arrived at by that court. Diligence, or the want of it, in a particular case, depends in so great a degree upon the various circumstances surrounding the parties and the conduct of the cause, which are peculiarly within the knowledge of the trial court, that its determination, made in view of them, would rarely be interfered with by us.”

future cases.²² If the movant elects to abandon the proceeding, the opposition has no power, or right, to prevent it.²³

22 The following acts and conditions were held not to constitute an abandonment of the motion: A refusal to argue the motion by the attorney for the moving party: *Carder v. Baxter*, 28 Cal. 99; delay during absence of judge until his return: *Warden v. Mendocino County*, 32 Cal. 655; delay until next term: *Simmons v. Goin*, 45 Cal. 669; delay of three months: *Chabot v. Tucker*, 39 Cal. 434; submitting motion without argument with an intimation that as far as movant was concerned, the court might overrule the motion, his rights on appeal being about to be lost on account of delay in disposing of the motion: *Wastl v. Montana U. Ry. Co.*, 13 Mont. 500, 34 Pac. 844; failure of movant for three days to appear and present statement to court: *State v. Central Pac. R. R. Co.*, 17 Nev. 259, 30 Pac. 887. The following acts and conditions were held to constitute an abandonment of the motion: A delay of more than four years: *Storke v. Storke*, 132 Cal. 349, 64 Pac. 578; delay for twelve years: *Doon v. Tesh*, 131 Cal. 406, 63 Pac. 764. In most of the above cases where delay was held not to constitute abandonment, there were circumstances excusing or explaining the delay. In *Wastl v. Railway Co.*, supra, the court said: "The second alleged ground upon which respondent relies to dismiss the appeal is that appellant consented to the order overruling his motion for a new trial, citing several cases wherein courts of last resort have declined to review an order or proceeding entered by consent of the party affected thereby. We readily concur in the proposition that a party would not be entitled on appeal to a review of an order or proceeding to which he consented; that is, where it appears that the complaining party assented to the substance and effect of the decision, he would not be entitled to a review thereof on appeal. We must therefore first ascertain whether the conduct of appellant has been such as to fairly justify the conclusion that he so consented to the disposition of his motion for a new trial. The record entry quoted above recites that the motion was, 'by consent, submitted to the court without argument'; but this entry is supplemented by stipulation in which counsel for appellant admits that, when said motion was submitted and ruled upon, appellant said that the 'court might pass upon said motion then and there, without taking time to consider the same, and that, so far as defendant was concerned, the motion might then and there be overruled.' The record further shows that, immediately after the overruling of appellant's motion for a new trial its appeal was perfected from the order. . . . Upon careful consideration we are unable to find in the showing on this point such tendency as would warrant the interpretation urged by respondent, or the dismissal of the appeal. It is one thing to consent to the conditions on which a controversy is to be determined, adjusted, or settled, and another to ask

In case objections have been made at a settlement of the statement or bill, and overruled, as they must have been, they may be renewed at the hearing. If there are any technical grounds upon which a motion for a new trial may be resisted, such as failure to file and serve notice of motion or to file statement in time, the proper practice is to raise such grounds on the argument of the motion, as a reason why the motion should be denied. It was so decided in *Quivey v. Gambert*,²⁴ and the practice thus settled has been, ever since, recognized as proper. But, as to the form of the court's action in such case, it has been held that there is no material difference between a dismissal and a denial of the motion, a dismissal being, in legal effect, a denial.²⁵ And yet there is a clear distinction between the defects apparent of record here, under consideration, and an abandonment of the motion. It is obvious that the latter objection cannot be properly raised otherwise than by a mo-

a court to make a formal ruling upon a proceeding which had been fully considered in that court, so as to enable the party feeling aggrieved to appeal for a review of the questions involved. We think appellant's conduct and suggestions at the time of submitting the motion for a new trial signify the latter intention only."

²³ *Stoyell v. Cole*, 19 Cal. 602.

²⁴ 32 Cal. 304. See, also, *Odd Fellows' Sav. Bank v. Deuprey*, 66 Cal. 168, 4 Pac. 1173; *Lucas v. Marysville*, 44 Cal. 212; *Gumpel v. Castagnetto*, 97 Cal. 16, 31 Pac. 898; *Bunnell v. Stockton*, 83 Cal. 320, 23 Pac. 301; *Sweeney v. Great Falls & C. Ry. Co.*, 11 Mont. 36, 37, 27 Pac. 347.

²⁵ *Warden v. Mendocino County*, 32 Cal. 655; *Davis v. Hurgren*, 125 Cal. 48, 57 Pac. 684; *Odd Fellows' Sav. Bank v. Deuprey*, 66 Cal. 168, 4 Pac. 1173; *Desmond v. Fans (Cal.)*, 33 Pac. 457; *Raynor v. Jones*, 90 Cal. 78, 27 Pac. 24. In the last case cited the court said: "A notice of motion for a new trial was served and filed in due season, and upon the hearing of the motion the trial court dismissed it, upon the theory, evidently, that as the judgment made and entered had been appealed from when the motion for a new trial came on for hearing, the court below had lost jurisdiction to determine it. This view of the matter is untenable, and the court should have heard the motion, and either granted or denied it, upon the bill of exceptions presented, which is a part of the record here on the appeal from the order of dismissal, the action of the court being, in legal effect, a denial of the motion for a new trial." To same effect, *Naglee v. Spencer*, 60 Cal. 10; *Carpentier v. Williamson*, 25 Cal. 167, 168; *Chase v. Evoy*, 58 Cal. 352.

tion to dismiss.²⁶ Although, upon appeal, it might appear that there had been considerable delay, yet, in the absence of a motion to dismiss, with a showing by the opposition, the supreme court must assume either that the delay was waived, or that facts excusing or explaining it were presented to the satisfaction of the lower court. On the other hand, a dismissal of the motion for a failure to take any preceding step in legal time apparent of record—and it would necessarily be so—appears to be erroneous, since the moving party is entitled to a ruling upon his motion upon the basis on which it is presented, although an objection such, for instance, as that the statement was not served in time, might be fatal to the motion when heard,²⁷ and in *Wyman v. Jensen*,²⁸ it was distinctly held that, while delay in bringing on the motion for hearing might be ground for dismissal for want of prosecution, yet it was not ground for denying the motion.

There is an order of precedence between the motion to dismiss and the hearing proper, on the motion for new trial, which cannot be ignored. Accordingly, it was held that an order, both denying and dismissing a motion for new trial, though somewhat inconsistent, must be considered as a dismissal, and proper, where, through inexcusable neglect of the moving party, the motion had not been brought into condition for hearing.²⁹ Under like circumstances, a denial of the motion was held proper.³⁰ In view of the fact that the proper practice is not affirmatively settled by the California decisions, the view, taken by the Montana court, in the case just noticed, is considered correct, and it is concluded that the motion to dismiss has its specific office, being limited to cases of abandonment.

The motion to dismiss should be regularly made upon notice, and should be heard upon affidavits. The delay or other facts

²⁶ See *Eckstein v. Calderwood*, 27 Cal. 413. A notice of intention to move for a new trial cannot be stricken out for want of diligence in prosecuting the motion: *Heilbron v. Heinlen*, 70 Cal. 482, 12 Pac. 385.

²⁷ See *Sweeney v. Great Falls etc. Ry. Co.*, 11 Mont. 34, 27 Pac. 347.

²⁸ 26 Mont. 227, 67 Pac. 114.

²⁹ *Descalso v. Duane* (Cal.), 33 Pac. 328.

³⁰ *Symons v. Bunnell*, 101 Cal. 223, 35 Pac. 770.

claimed to constitute abandonment—if the abandonment be not voluntary and admitted—should be shown, and the movant given an opportunity to answer any showing so made.

§ 383. Failure to prosecute further considered.

In the last preceding section was considered the case of a failure to take proper steps within legal time during the making up of the record on the motion, actually made up and before the court, and that of an abandonment after a completion of the record. There remains to be considered the case of the entire failure of the movant to move further after initiating the proceeding by serving and filing notice of intention, or other paper by which the proceeding is begun, or after any other intermediate step prior to the completion of the record; and also the case of the court's sustaining the objections of the opposition at the settlement and refusing to settle the statement or bill. In the case of an entire failure, at any stage, to take the next step, the way is plain. The opposition moves for a dismissal for abandonment as pointed out in the preceding section. But a motion cannot be said to have been abandoned where, though the movant has defaulted at some stage, he has in good faith—and good faith will be presumed—brought the proceeding to the stage of, and applied for, a settlement. If the settlement has been refused, and the movant has taken no further step, such, for instance, as the presentation of a petition to the supreme court for a writ of mandate against the judge, the opposition should, after reasonable time allowed the movant for making such application, present the matter to the court upon affidavits and the files, but, upon notice to the movant, and ask to have the proceeding dismissed. The practice indicated in the opinion in *Sutton v. Symons*,³¹ was not strictly in accordance with this view, but no objection to the procedure adopted in that case was made. In that case, there was nothing to show whether any statement had ever been settled. At any rate, when the motion came to a hearing, there was no statement on file, it having been stricken out on motion. The opposition made no motion for a dismissal of the proceedings, and the court made an order denying the motion from

³¹ 100 Cal. 576, 35 Pac. 158.

which the movant appealed. As no point was made on the procedure, the court had no alternative but to affirm the order. Substantially the same condition was presented in *Pereira v. City Savings Bank*.⁸² There was no point upon the procedure adopted in the lower court. But the decision really turned upon the failure of the appellant to properly incorporate affidavits used at the hearing in a bill of exceptions. In *Brown v. Bank Commissioners*,⁸³ the motion had been heard by the lower court and denied, and the movant appealed. The appeal was dismissed because it did not appear upon what, if anything, the lower court heard the motion. Here again no point was raised upon the procedure in the lower court.

It is clear upon authority that under the statutory proceeding there can be no such thing as a "hearing" if no steps whatever have been taken as a foundation for a new trial. It is equally clear that though such proceeding has been commenced and partially prosecuted to a hearing, and then lapsed before the completion of any record, and the movant fails to furnish any record upon which a hearing can be had, there can be no hearing in any legal sense, such hearing being one of the statutory steps in the proceeding. Such being the case, and since an order denying a motion, presupposes that a motion has been made and heard, there is no necessity or place for an order denying the motion. The proper practice then for the opposition, desiring to get rid of the proceeding, under these circumstances, is to move for a dismissal in the way above suggested.

§ 384. Objections based upon failure to file affidavits in time.

Somewhat different rules from those already discussed, will apply where the motion is based in whole or in part upon grounds which must be presented and heard upon affidavits. In the case of a statement or bill prepared and settled in advance of the hearing, the movant has already been afforded an opportunity to explain or show excuse for any preceding lapse or delay, and the ruling on all objections, as well as upon such showing of the movant in answer thereto, should

⁸² 128 Cal. 45, 60 Pac. 524.

⁸³ 15 Mont. 244, 38 Pac. 1072.

appear in the record. But in the case of a lapse, or an apparently fatal delay in the matter of serving and filing affidavits, these appear against the movant in the files without his having had an opportunity to explain or make excuses. It is a nice question which has not been clearly settled, just what is the proper practice herein. If the motion were noticed to be entirely upon affidavits, and none had been filed, there would be no time or place for a hearing; the proceeding would never mature to the point of even taking steps to bring on a hearing, and a motion by the opposition to dismiss would obviously be in order. If the motion be noticed to be both upon a statement or bill and affidavits, and there has been an abandonment with respect both to perfecting the former and filing and serving the latter, a motion to dismiss would likewise be in order. When, however, affidavits have been served and filed, but for aught that appears of record, served and filed too late, whether there be a statement or bill in the case, the question arises how the opposition should raise the question and how it should be disposed of. If, *prima facie*, no affidavits whatever have been filed in time, it would seem that the question might as well be raised by motion to dismiss as in any other way, with respect to the grounds for the motion, based on affidavits, and the movant could meet such motion with any showing he is able to make as an explanation of the delay. But the order on such motion is appealable; and suppose the motion to dismiss be granted, and on appeal it is reversed? In that case the movant may be subjected to the expense and delay of two appeals, the one from the order of dismissal and the other from an order denying his motion for a new trial. It is clear that a motion to dismiss would not be held the proper practice where the files show some of the affidavits to have been served and filed in time.

The opposition does not waive the right to object at the hearing to the introduction in evidence of the affidavits of the movant on the ground that the same were not filed in time, by not moving to strike them out. It was so decided in *Heine v. Treadwell*;⁸⁴ and of course the movant would not be held to waive any objections to counter-affidavits by reserving them until

⁸⁴ 72 Cal. 217, 13 Pac. 503.

the hearing. In the case just mentioned the question was as to whether the opposition had not waived his objection by failing to move for a dismissal. He had moved to strike out the affidavits and the action of the court granting this motion was excepted to, the whole matter being brought up in a bill of exceptions. This practice the supreme court tacitly sanctioned, but there was nothing in the decision in conflict with the more convenient practice above suggested.

There is an obvious inconsistency in striking affidavits from the files and afterward, in case of error in doing so, and after an appeal to the supreme court and a reversal, admitting them in evidence, the order striking them out not having been appealed from.

The time within which counter-affidavits may be filed is not jurisdictional, but is only a rule of procedure subject to the equitable control of the court,³⁵ and therefore the proper practice is as here suggested in the case of affidavits of the movant filed too late.

Since a bill of exceptions is required by California supreme court rule 29, in all cases where an appeal is taken from an order

³⁵ *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529. See, also, *Spottiswood v. Weir*, 80 Cal. 448, 22 Pac. 289, holding that the court may allow counter-affidavits to be filed on a motion for new trial after the time limited by the code, under a showing that they had been prepared and served, and that the filing was omitted through oversight or mistake. In the first case here cited the court said: "This ground of the motion for a new trial, as well as the subject matter of the affidavits, made it essentially proper that the court should allow the plaintiff an opportunity to reply to these affidavits, if it was within its power to do so; and matters presented in support of a claim of inadvertence and excusable neglect are so greatly within the discretion of the court to which they are addressed, that unless there should appear to be an abuse of that discretion, we would not interfere with its action. The defendants were not entitled to a new trial upon this ground, unless the facts upon which it was based existed, and the time within which the plaintiff might controvert such affidavits is not made by the statute jurisdictional, or declared to be a limitation upon the exercise of such right. It is only a rule of procedure, and in the absence of statutory limitation, is subject to the equitable control of the court, and the court should disregard any error or defect in the proceedings, whenever a substantial right of a party is not affected."

after a hearing on affidavits, the opposition should in all such cases be required to reserve his objections until the affidavits are offered in evidence on the motion, and the movant should then be permitted to move, if so advised, for relief under section 473, the whole matter to be embodied in the bill of exceptions, provided for under said rule. The rule is an expression of what the statute implies as construed by the supreme court.³⁶

The power and right of the court to relieve a party from a failure to file affidavits on the motion within the legal time is well established. Such relief may be granted to the opposition with respect to counter-affidavits, as well as to the movant with respect to affidavits in support of the motion.³⁷

§ 385. Objections at hearing of motion on minutes.

In the case of a motion noticed to be presented on the minutes, upon failure of the movant to take steps to bring on the hearing within a reasonable time, the opposition may undoubtedly move for a dismissal, as for an abandonment. Technically, he could not do so without first exercising the right which the code gives him to himself bring on the hearing, but no consequences are attached to his failure to exercise it; and the only advantage that could be taken by the movant of such failure would be by objection taken at the hearing of the motion to dismiss. But the movant would then have to explain and show excuse for his delay if unreasonable; and, in any event, if without excuse for further delay, he would have to consent to an early hearing as a condition of denial of the motion to dismiss.

But no other ground for a dismissal than abandonment by failure to prosecute, is conceivable in case of a motion noticed on the minutes alone. There have been but two steps in the proceeding, the notice and the hearing, unless the viva voce motion be counted; but that is merely incidental to the hearing, or rather an essential part of it.

§ 386. Waiver of right by accepting settlement before hearing.

When the proceeding for new trial is distinct from and in-

³⁶ See post, §§ 455, 456.

³⁷ Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289; Smith v. Whittier 95 Cal. 279, 30 Pac. 529.

dependent of, the main case, a party may accept settlement and satisfaction of a judgment in his favor without waiving his right to a new trial. It often happens that a party is dissatisfied with a judgment in his favor; and the mere fact that it is so, does not deprive him of the right to proceed for a new trial.³⁸ And unless a new trial were expressly waived, or if already initiated, there were a stipulation for its dismissal, or unless the cause of action were extinguished, such payment and satisfaction would not have a further prosecution of the motion or be any ground for a denial of the motion. In fact, it is not discernible how the fact of such settlement could be shown on the motion. It appears to be otherwise, however, when the motion is a part of the proceedings at the trial, and the pendency of the motion suspends the entry of judgment.³⁹

§ 387. Postponement of hearing.

The continuance or postponement of the hearing may be briefly noticed here, as a matter preliminary to the hearing. It is a matter almost exclusively within the discretion of the trial court, and is of but slight importance, except where repeated continuances, and protracted postponements, or a failure to delay the hearing might cause actual injury to a party, or imperil interests dependent upon the time for disposing of the motion. Statutes usually place a limitation upon delay in preparation for the hearing. Within the limitation, no instance can be found where the power of the court to extend time and thus practically postpone the hearing and determination of the motion was successfully questioned. As to some of the steps which may be taken during the period of preparation, the Code of Civil Procedure of California places no limitation upon this power of the court. Under section 659, subdivision 1, the court has power to extend the time for filing affidavits on motion for a new trial to more than thirty days beyond the statutory time. The limitation on the court's power of extending time

³⁸ Ante, § 358.

³⁹ *Atlantic Contracting Co. v. Hyde*, 108 Ga. 799, 33 S. E. 995. See, also, *Seigel Welch & C. L. S. Com. v. Johnson*, 4 Okla. 99, 44 Pac. 206; *Leonard v. Brockman*, 46 S. C. 128, 24 S. E. 96.

in other classes of cases imposed by section 1054 of that code has no application to such a case.⁴⁰

It might occur that a party was entitled to a postponement of the hearing pending an application to the supreme court to prove an exception; and it would probably be held an abuse of discretion to refuse a reasonable postponement in such case. An application for a postponement should set forth all the facts and proceedings very fully. The party could then make the application, the ruling thereon and the exception thereto a part of the record on appeal from the order on the motion for new trial, by embodying the same in a bill of exceptions, and thus preserve his rights under the pending application to the supreme court. Sufficient appears in the opinion in *McLean v. Crow*⁴¹ to indicate that this would insure a consideration of the court's ruling, though what was then said must be regarded as dicta. Temple, J., delivering the opinion said: "If the defendant had petitioned for leave to prove an exception which had been denied by the trial court, that court ought to have granted time for that purpose. There is here, however, no evidence of such fact, or any evidence that we can notice that such application was pending. The records of this court show that an application of that character was made June 8th, and was not successful. The motion for a new trial had been denied on the previous day, after due notice."

Other causes for postponement such as usually occur, need not be specially noticed.⁴² The power of courts to continue beyond the term at which the trial is had, and the effect of orders to

40 *Oberlander v. Fixen & Co.*, 129 Cal. 690, 62 Pac. 254. See *State v. Taylor*, 134 Mo. 109, 35 S. W. 92 as to discretionary power of court to allow or disallow time for procuring of reply affidavits. See generally as to court's discretionary power herein: *McElveen Com. Co. v. Jackson*, 94 Ga. 549, 20 S. E. 428.

41 88 Cal. 644, 650, 26 Pac. 596.

42 See *Clifford v. Denver & S. P. R. Co.*, 12 Colo. 125, 20 Pac. 333, an instance where motion for new trial was continued until the first day of the next term to see if witnesses mentioned in application on ground of newly discovered evidence could be procured; see, also, *Eickhoff v. Brooke* (Mich.), 88 N. W. 397, continuance to allow depositions of witnesses unwilling to make affidavits to be taken.

the same effect are other questions which relate more properly to the jurisdiction of courts than to the present subject.⁴³

§ 388. The scope of inquiry.

Where the parties do not acquiesce in a summary and perfunctory denial of the motion reserving the real contest for the appellate court, as is often done, but proceed to earnestly litigate the questions raised by a motion for new trial the duties of the court in hearing and disposing of the matter are by no means simple. The hearing was in one case previously referred to defined as a trial. It may be that, and even more. The court often sits not only to try new issues of fact which may be made by affidavits, but in review upon its own rulings and decisions; consequently it is important in each instance to determine at the outset, the scope of inquiry.

In the first place, no matter upon what grounds, nor upon what moving papers the motion is presented, the court should not investigate questions which it was the right and duty of the parties to have presented in some other form before or during the trial, whether such questions were in fact so presented and passed upon or not. Among them are objections to the pleadings, whether with reference to substance or form.⁴⁴ And it seems that the entire absence of an issue made by the pleadings may be disregarded, if the trial is conducted by both parties on the theory that there is such an issue in the case,

⁴³ See *Higginbotham v. Campbell*, 85 Ga. 638, 11 S. E. 1127, holding that where a motion for a new trial is ordered, in term, to be heard at chambers on a certain day, and on such day the hearing is continued to the first day of an adjourned term of the court, the motion may be heard at any time during such adjourned term, without any further continuance. See, also, *United States v. Hood*, 19 D. C. 372.

⁴⁴ See *Spanagel v. Dellinger*, 38 Cal. 278; *People v. Turner*, 39 Cal. 372; *Mason v. Austin*, 46 Cal. 385; *Jacks v. Buell*, 47 Cal. 162; *Rauer v. Fay*, 128 Cal. 523, 61 Pac. 90; *Onderdonk v. San Francisco*, 75 Cal. 534, 17 Pac. 678; *Wheeler v. Kassabaum*, 76 Cal. 90, 18 Pac. 119; *Byxbee v. Dewey*, 128 Cal. 322, 60 Pac. 847. There appears to be an exception to this rule in cases where a defendant asks for a nonsuit and upon its denial, moves for a new trial: See *Alpers v. Hunt*, 86 Cal. 78, 82, 21 Am. St. Rep. 17, 24 Pac. 846.

and evidence is introduced without objection based on the omission of such issue. Thus where the parties in an action to condemn land proceeded to trial and judgment upon the assumption by both parties that the value of the land sought to be condemned was at issue, it was held that the owner could not complain upon the hearing of a motion for a new trial, that the court had no jurisdiction to hear or determine the question of value, for want of an issue of fact thereupon.⁴⁵ On the other hand, a party is entitled to have the inquiry limited to that part of the case tried upon which the decision in favor of the other party rests. Thus it was held in trespass to try title (ejectment), in which judgment was rendered on service by publication, to entitle a defendant to a new trial the burden was not thrown on him to prove a good title in himself. It was sufficient if his showing disclosed that the plaintiff was not entitled to recover.⁴⁶ The court should keep constantly in view the issue to be retried in the event of the granting of a new trial, and confine the investigation accordingly. For instance, where a verdict of guilty on one count only of an indictment containing two or more counts has been rendered, it should be borne in mind that if a new trial be granted the defendant can be retried only for the offense charged in the count upon which he has been found guilty.⁴⁷ But where a defendant was convicted upon six counts of an indictment and moved for a new trial generally, and refused to have the motion considered as to each count separately, it was held the court might, without error, overrule the motion, if the evidence, as a whole sustained the conviction.⁴⁸

The making of a motion for a new trial upon the statutory grounds does not save an objection going to the form of the action, in that the testimony shows a variance or a failure of proof, where no objection was made to the admission of the evidence, nor any motion for nonsuit on account of failure of

⁴⁵ *San Diego L. & T. Co. v. Neale*, 88 Cal. 50, 25 Pac. 977.

⁴⁶ *Miles v. Dana*, 13 Tex. Civ. App. 240, 36 S. W. 848. See, also, *Norris v. Churchill*, 20 Ind. App. 668, 51 N. E. 104, refusal to consider assignment of excessive damages because action not one of tort.

⁴⁷ *State v. McNaught*, 36 Kan. 624, 14 Pac. 277.

⁴⁸ *State v. Stredder*, 3 Kan. App. 631, 44 Pac. 34.

proof, nor any request for an instruction to find for the appellant for such reason.⁴⁹ Nor will a party be awarded a new trial upon any ground which should have been urged on an application for a continuance.⁵⁰

It should be stated that under the practice in Oregon, trial courts have unusual discretion in passing on motions for new trials, and may consider everything that occurred during the trial whether objected to or not, so that they may sometimes modify or set aside verdicts for reasons that would not be considered by the appellate court.⁵¹

§ 389. The scope of inquiry—Motion made on statement or bill of exceptions.

It is obvious that where the motion is made alone upon a

⁴⁹ *Sweeney v. Pacific Coast Elevator Co.*, 14 Wash. 562, 45 Pac. 151. In this case Justice Scott, delivering the opinion, said: "Appellant's main contention, aside from the one relating to the refusal of the court to try certain of the issues as equitable issues, or by a reference, goes to the form of the action, in that the testimony showed a variance or a failure of proof. It does not appear that any objection was made to the admission of this evidence, however, nor that there was a motion for a nonsuit on account of failure of proof, or any request for an instruction to the jury to find for the defendant for such reason, and the matters alleged or complained of are, therefore, not available as relating to the form of the action, and at most can only raise the question as to whether the evidence was insufficient to sustain the verdict; and as, after an examination of the record, we are satisfied that there was evidence sufficient for that purpose, there was no error in the premises."

⁵⁰ *McGibbon v. State* (Tex. Cr. App.), 29 S. W. 775. See, also, *Corbett v. National Bank of Commerce*, 44 Neb. 230, 62 N. W. 445; *Denison v. Foster*, 18 R. I. 735, 31 Atl. 894.

⁵¹ See *Watson v. Southern Oregon Co.*, 39 Or. 481, 487, 65 Pac. 985. In this case the court said: "Under our system the trial courts are invested with very large discretion in granting or refusing motions for new trials, and are not bound to confine their decisions to errors occurring on the trial. Thus, if improper evidence should be admitted without objection, it might afford a sufficient reason for granting a motion for a new trial, or for reducing the amount awarded by the verdict; but it certainly could not be made the basis of an assignment of error on appeal. This court is organized to correct errors of the trial court, and, before it can act, some legal error must be made to appear." The whole opinion is instructive on the subject.

statement or bill of exceptions prepared before the hearing, that must be looked to as a full measure of the court's authority to investigate all extraneous motions, including those just mentioned, being excluded. This rule is considered so important that a statement properly settled and allowed cannot be disregarded in determining a motion for a new trial, though the court may be of opinion that it does not correctly set forth the facts.⁵² And matters contained therein, and specified as error, will not be regarded where no objection or exception was reserved at the trial.⁵³ In the application of this rule, the absence of a party against whom evidence was offered makes no difference.⁵⁴ And if incompetent testimony is admitted without objection, the court will treat the testimony as competent on motion for a new trial.⁵⁵

It is a general rule, to which there are no exceptions, that the court cannot, for the purpose of granting a new trial, in a proceeding instituted therefor by a party, go beyond the grounds upon which it is sought.⁵⁶ To ascertain these grounds reference

⁵² *Steinkraus v. Minneapolis L. & M. Ry. Co.*, 39 Minn. 135, 39 N. W. 70. For power of court to amend statement, see post, § 446.

⁵³ *Paris v. Raynor*, 76 Cal. 647, 18 Pac. 788. This is too well settled to justify further citation of authority or any elaborate discussion. In *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. 309, Chief Justice Waldo, delivering the opinion, said: "It is not error simply, but error legally excepted to, that constitutes ground for reversal." And in *Watson v. Southern Oregon Co.*, 39 Or. 481, 488, 65 Pac. 985, the court said: "It is manifest that the reasons given by the trial court for requiring plaintiffs to submit to a reduction of the verdict or a new trial could not make the statements of counsel assignable as error on appeal, unless the question was preserved by an objection or exception to some previous ruling."

⁵⁴ *Clark v. Gridley*, 35 Cal. 398.

⁵⁵ *Jansen v. Brooks*, 29 Cal. 214; *McCloud v. O'Neill*, 16 Cal. 892; *Wright v. Roseberry*, 81 Cal. 91, 22 Pac. 336. Where the party pleading fraud generally moves for a new trial, and the statement fully sets out the evidence of fraud, and specifies sufficiently that the verdict is against that evidence, the fact that no objection to the evidence of fraud appears in the statement is sufficient proof that none was made at the trial: *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497.

⁵⁶ See *Alpers v. Hunt*, 86 Cal. 78, 21 Am. St. Rep. 17, 24 Pac. 846. Ante, § 368.

must necessarily be had to the statement.⁵⁷ And this rule applies as well to any technical objections—for instance, that the proceeding has lapsed—as to the grounds upon which the new trial is sought.⁵⁸ And the court should observe the forms pre-

⁵⁷ *Cole v. Wilcox*, 99 Cal. 549, 34 Pac. 114. See *Feister v. Kent*, 92 Iowa, 1, 60 N. W. 493, holding that affidavits alleging prejudice of referee should be stricken from the files; *State v. Wright*, 112 Iowa, 436, 84 N. W. 541, holding that in case of disqualified juror, the state cannot urge on motion for new trial that the juror was not really sworn on his voir dire examination wherein he answered falsely.

⁵⁸ *Cole v. Wilcox*, 99 Cal. 549, 34 Pac. 114; *Beck v. Thompson*, 22 Nev. 109, 117, 36 Pac. 562. In the first of above cases the court said: "When the motion for a new trial came on for hearing, the defendant objected to the court hearing the same, upon the ground that the statement of the case proposed for settlement by the court was not served upon him by the plaintiff within the time allowed by law, and that the court had lost jurisdiction to settle any statement in the case, and now urges that for this reason the court erred in granting a new trial. The correctness of the court's action in granting the new trial must be determined upon the record on which it acted upon the hearing of that motion, and is not affected by any error which it may have committed in matters not connected with such action. The judge had settled and allowed the statement prior to this time, and had recited therein that it was 'duly prepared and settled within due time and in the manner required by law'; and also that the defendant objected to settlement of statement upon the ground that the same was not served in time.' If there were any reasons in support of this objection on the part of the defendant, the proper practice would have been to present them at that time so that the judge could pass upon their sufficiency, and to have the objections with the rulings of the judge thereon and any exception thereto, incorporated into the statement. A mere objection to the settlement of the statement, without pointing out the basis or grounds of the objection, or presenting the facts upon which it was made, was not fair to either the judge or the opposite party; and even if an exception had been taken to the ruling of the judge upon such objection, the party taking the exception would not have the right to its consideration upon appeal. When the motion for a new trial came on to be heard, the court, in its action thereon, was limited to considering the matters contained in the statement, and was not at liberty to go outside of the statement for the purpose of determining whether the new trial should be granted or refused." In the second case the court said: "The respondent moves to strike out the statement

scribed by law for the presentation of the various grounds; it has no power to receive extrinsic evidence in support of grounds which must find support if at all in the statement or bill. Thus it was held that the taking of improper papers to the juryroom would not be considered under an assignment of error.⁵⁹ Nor can additional and extraneous evidence, not offered on the original trial be introduced on the trial of an

on motion for a new trial, upon the ground that no notice of intention to move for a new trial was given. The record does not contain any such notice and the only reference thereto is in the opening of the statement on the motion, where it is said that the appellant 'makes his motion for a new trial on the grounds mentioned in his notice of motion made and filed.' He now, however, under a suggestion of diminution of the record, offers what purports to be a copy of such notice, containing an admission by respondent's attorneys of regular and sufficient service, certified by the clerk of the district court to be a true copy of the notice on file in his office, but it was not made a part of the statement, nor is it identified as having been used or referred to on the hearing of the motion for a new trial if, indeed, such identification would be sufficient to entitle it to consideration here. Under these circumstances, it is not a part of the record on appeal, and consequently cannot be considered by us: *Greeley v. Holland*, 14 Nev. 320; *Mining Co. v. Barstow*, 5 Nev. 252; *Caldwell v. Greely*, 5 Nev. 258. We are, however, of the opinion that, if no sufficient notice of the motion had been given, the objection should have been made in the court below, when the missing papers might have been supplied and made part of the statement. There does not seem to be any statutory provision for making the notice of motion for new trial a part of the record on appeal. It does not direct that it shall be included in the statement on the motion, nor is it mentioned among the papers which may be identified by the judge or clerk as having been used or referred to upon the hearing of the motion. But, notwithstanding, had it been copied into the statement we would perhaps, under the decisions have held that it was properly before us, upon the principle that the statement is to contain everything necessary for the presentation of the grounds for new trial, and for which no other method of bringing before the court has been provided (*Mining Co. v. Barstow*, 5 Nev. 252), but, in the absence of timely objection in the court below, it does not seem that it should necessarily have been placed there."

⁵⁹ *Cranmer v. Kohn*, 11 S. Dak. 245, 76 N. W. 937. See *McQueen v. Mechanics' Inst.*, 107 Cal. 163, 40 Pac. 114, holding evidence of misconduct of jury irrelevant where motion based on insufficiency of evidence.

application for a new trial, unless based, wholly or in part, on the ground of newly discovered evidence.⁶⁰

The failure to specify matters relied on separately may have the effect of narrowing the review by the trial court, as well as by the appellate court. Thus, where several acts of the court are assigned jointly as cause for a new trial, all such acts must be erroneous to authorize a new trial.⁶¹

§ 390. The scope of inquiry—Motion made on affidavits.

The rules set forth in the two preceding sections are capable of a general application, and their statement leaves but little to be said under the present head. The affidavits are to be considered, however, in connection with the record. And it was held that on a motion for new trial for irregularity of the court, consisting in the absence of the judge from the courtroom during the trial, the issue must be determined upon the affidavits filed, and not upon the judge's belief as to the length of time of his absence.⁶² But in two other cases the language

⁶⁰ *Mayeski v. His Creditors*, 40 La. 94, 4 South. 9; *Brander v. Krebbs*, 54 Ill. App. 652; *Klink v. People*, 16 Colo. 467, 27 Pac. 1062, holding that confession after the lapse of the term of principal witness for prosecution that he committed perjury is no ground for a new trial.

⁶¹ *Gray v. Elzroth*, 10 Ind. App. 587, 53 Am. St. Rep. 400, 37 N. E. 551.

⁶² *People v. Blackman*, 127 Cal. 248, 59 Pac. 573. In this case the court said: "Upon the hearing of the motion of defendant for a new trial two affidavits were read in its support, made by two different persons who were present at the trial. In substance they deposed that after the court had instructed the jury, and while the district attorney was addressing the jury, the presiding judge left the bench and the courtroom and went into another room, closed the door behind him and was absent from the courtroom about ten minutes, during which time the district attorney proceeded with his argument to the jury upon the facts of the case. No affidavit disputing these facts or explaining the absence of the judge was made by anyone. Defendant's affidavits were filed with the notice of motion for a new trial, and when the motion came on to be heard and the affidavits were read the court made the following remark: 'What! what! The court knows of its own knowledge that it was not absent any such time or in any such manner, and was not out of hearing of counsel while arguing said cause at any

of the court was at variance with that used in this case and was to the effect that controlling consideration should be given to the opinion of the judge as to the condition of jurors charged in affidavits to have been incapacitated by reason of intoxication.⁶³

§ 391. Matters to be considered in connection with affidavits.

There appears not to be in California any express statutory authority for the consideration of a statement or bill of exceptions on file, or of the evidence taken at the trial in the form of phonographic notes or otherwise, in the cases where it is directed that the motion shall be heard upon affidavits. Section 658 of the California Code of Civil Procedure reads as follows: "When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the last section, it must be made upon affidavits; for any other cause it may be made at the option of the moving party, either upon the minutes of the court, or a bill of exceptions, or a statement of the case, prepared as hereinafter provided."

It is provided in section 660 that: "On such hearing reference may be had in all cases to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference

time, and that the door of my chamber was open at that time, and even when the door is shut I can hear all that is going on in the courtroom. . . . The judge's belief cannot overcome the legal conclusion to be drawn from the facts. The attorney general also claims that the statement of the judge from the bench must be received as a refutation of the facts set forth in the affidavits. We are not called upon to decide whether the statement of the court is to be received as the equivalent of an affidavit in all cases, or whether the rule in the case of *People v. Compton*, supra, applies, as is claimed by defendant. The facts stated in the affidavits were not in their nature better known to the judge than to others in the courtroom—the sheriff, the clerk, counsel, and bystanders. If the statements were untrue, the facts could have been easily so shown by affidavit." The court distinguishes such case from matters of proper judicial knowledge, citing authorities.

⁶³ *People v. Sullivan*, 129 Cal. 557, 62 Pac. 101; *People v. Tucker*, 117 Cal. 229, 49 Pac. 134. But the expressions of the appellate court in both these cases may be regarded as dicta. In the first case cited the defendants did not present their affidavits; in the second the affidavits were conflicting.

may be had to any depositions, documentary evidence, and phonographic report of the testimony on file." The code itself nowhere furnishes any explanation of the omission to provide for a reference to the proceedings or evidence taken at the trial, except where evidenced by an order, in cases of a hearing on affidavits; and the language employed in the two sections just referred to would appear to exclude any such reference. And yet a construction which would forbid an examination of what is conventionally known as the "record" made at the trial on such hearing would lead to the most glaring absurdities. So general has been the acquiescence in a contrary construction that no case can be found in which a question was raised as to the right of the parties and the power of the court to freely resort to such record where the hearing was on affidavits.⁶⁴ There has rarely been a case of a decision of the supreme court of California or any other state on appeal from an order on motion for new trial presented on affidavits in which that court has not decided in constant view of, and with express reference to, the case made at the trial. And often appellate courts have expressed their inability to give effect to points made on affidavits because there was nothing in the record to explain or supplement them. It could not have been the intention of the legislature that all the relevant matters before the court should be set forth in affidavits. If so, the court must close its eyes to the record before it and rest the question of what it contains upon the recollection of the litigants, or of

⁶⁴ Probably the nearest approach to a direct decision of the point is to be found in *Woods v. Jensen*, 130 Cal. 200, 205, 62 Pac. 473, where it was said of the provision requiring certain grounds to be presented upon affidavit: "It is quite evident that this ground for a new trial (irregularity of the court) is intended to refer to matters which an appellant cannot fully present by exceptions taken during the progress of the trial, and which therefore must appear by affidavit." See, also, *People v. Merkle*, 89 Cal. 82, 26 Pac. 642, where it was held that affidavits on motion for new trial of female defendant found guilty of manslaughter, made by herself and her husband, to the effect that he, and not the defendant, committed the homicide, and that he told her of the fact before the trial, but refused to allow her to use the communication in her defense, are not per se ground for a new trial, as the question of the truth of such affidavit is a matter for the consideration of the trial judge, and to be determined by reference to all the evidence in the case.

such witnesses as they may induce to make affidavits, and must be governed by the number of affidavits pro and con and the positiveness of assertion or lack of it shown therein. Testing the practicability of this suggestion in the case of a motion for new trial on the ground of newly discovered evidence, taken for illustration, it is clearly seen, without going into details, how difficult it might be to avoid a new trial by any test of the truthfulness of the allegations contained in the affidavits on the part of the movant. But both the power and duty of trial courts to consider the record in connection with the affidavits is uniformly conceded; and the right of the parties herein must be coextensive with that of the court. At any rate, such right is constantly exercised and has never been seriously disputed.⁶⁵ The Nevada statute substantially identi-

⁶⁵ The following are a few of the cases in which the proceedings at the trial were resorted to to test the merits of applications for new trials based on affidavits: *People v. Warren*, 130 Cal. 683, 63 Pac. 86; *Steward v. Hinkel*, 72 Cal. 187, 13 Pac. 494; *Chapin v. Goodel*, 2 Colo. 608; *Tyler v. North American Trading & Tr. Co.*, 24 Wash. 252, 64 Pac. 162; *Light v. Chicago etc. Ry. Co.*, 93 Iowa, 83, 61 N. W. 380, holding that showing by affidavit that juror was examined as to his qualifications not sufficient. It should be shown by the record; *Spottswood v. National Bank*, 44 Neb. 1, 62 N. W. 245, holding that on an application for a new trial because of an unauthorized appearance of an attorney for one of the plaintiffs, the court may consider all matters of record having a bearing on the issue, aside from the affidavits on which the application is made; *Maloney v. State* (Tex. Cr. App.), 43 S. W. 980, holding that in passing on a motion for a new trial, the court may look to the evidence of a witness on the examining trial to ascertain whether it is probably true that a witness will swear to the facts as stated in the motion; *State v. Fenlason*, 78 Me. 495, 7 Atl. 385. In the first case cited, consideration could not be given to the proffered new evidence because the absence of the evidence taken at the trial prevented a determination as to its materiality. The second case was one in which the ground of the motion was alleged misconduct of a juror. The court said: "There is nothing in the record to indicate that defendants and their counsel were not fully informed of the temporary absence of one of the jurors during the trial: *Berry v. De Witt*, 27 Fed. 723; *Parsons v. Huff*, 38 Me. 141. The court's attention should have been called to the absence of the juror." The point raised on the motion in *Tyler v. North American etc. Co.*, supra, could not have been given due consideration without reference to the record, as is obvious from the following extract

cal with section 660 above quoted, in part, was construed in *Bliss v. Grayson*,⁶⁶ where it was held that on the argument of a motion for a new trial, reference might be made to the pleadings, depositions and evidence, and the minutes of the trial court, in determining the right of a party to a new trial, and the right was held not to be limited to the specific matters contained in the statement or affidavits on motion for a new trial; also that the original pleadings would be considered as part of the record on appeal although not embodied in such statement, or identified as having been read or referred to on the hearing of the motion.

It is scarcely necessary to say that where the motion is made upon any ground as to which the statute requires a presentation upon affidavits, the substantive cause alleged must at least be made to appear in that way, aside from any question above discussed.⁶⁷

§ 392. The scope of inquiry—Motion upon minutes.

Where the motion is heard on the minutes, the range of inquiry is, of course, confined to the grounds set forth in the notice of intention; and if these grounds be errors in law occurring at the trial, or insufficiency of the evidence, or both, it is further limited by the specifications of these contained in the notice.⁶⁸ There is but one other ground which may be presented exclusively on the minutes, excessive damages, but as to that no specifications are required. The code, as previ-

from the opinion: "The respective counsel filed affidavits upon the motion for a new trial, stating the facts substantially as mentioned. Counsel for defendant maintain that the deposition was material, in that it contradicted the testimony of the plaintiff who testified. An examination of the deposition shows, however, some variations in the statements between the plaintiff who testified and the deponent as to the extent of some of the items of damage."

⁶⁶ 24 Nev. 422, 56 Pac. 231.

⁶⁷ See *Saltzman v. Sunset Tel. etc. Co.*, 125 Cal. 501, 58 Pac. 169; *Woods v. Jensen*, 130 Cal. 200, 62 Pac. 473; *Benjamin v. Stewart*, 61 Cal. 605; *Beans v. Emanuelli*, 36 Cal. 117; *Bate v. Miller*, 63 Cal. 233; *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74; *Orr v. Haskell*, 2 Mont. 225; *Lyborger v. State*, 2 Wash. 552, 27 Pac. 449, 1029; *State v. Laycock*, 136 Mo. 93, 37 S. W. 802.

⁶⁸ See Cal. Code Civ. Proc., § 659; ante, § 368.

ously stated, specifically states to what reference may be had at the hearing.

Some uncertainty may have existed as to what was meant by the expression "phonographic report of the testimony on file." The common practice in trial courts of treating the shorthand notes in the hands of the reporter as being "on file" for the purpose of the motion cannot be considered as the equivalent of an authority sanctioning such conclusion. Many attorneys have considered it necessary, to have the notes transcribed and actually filed before the hearing and have put that construction into practice when adopting that form of notice. It was held, however, in a South Dakota case that a transcription and filing was unnecessary, the statute there being similar to that of California.⁶⁹

There should be no longer any uncertainty as to whether a motion can be legally noticed and heard on the minutes in the cases where no notes of the testimony and proceedings are taken down at all. That question may be considered as set at rest by the decision in *Malcomson v. Harris*.⁷⁰ In that case the motion was heard on the minutes and denied. The judge struck out of the statement subsequently prepared and presented for settlement everything relating to the trial, including the evidence and refused to settle or act upon the same, upon the ground that there were no minutes thereof—that is to say, there were no shorthand notes of the evidence, no reporter having been present at the trial, and no notes of the evidence filed or taken in writing by either the clerk or judge. The opinion was delivered by the chief justice, who, after stating the case and referring to the code provisions bearing on the subject, said: "It is true that the statute enumerates depositions, documentary evidence, and phonographic report of testimony as matters to which reference may be had on the hearing of the motion, and there is some force in the argument that such an enumeration should be regarded as exclusive; but there is much more force in the consideration that since the judge has the undoubted right to include testimony already given, though not reported, in a statement prepared in advance of the hearing, there is no

⁶⁹ *Distad v. Shanklin*, 11 S. Dak. 1, 75 N. W. 205.

⁷⁰ 90 Cal. 262, 27 Pac. 206.

reason why his recollection of the evidence should not be equally resorted to in making a statement after the hearing. The statement, at whatever time prepared, ought to be a correct presentation of so much of the testimony as is material, derived from the reporter's notes, if there are any, and if not, from the recollection of the judge, assisted by such notes as he may have taken; and the mere fact that there is no shorthand report of the trial ought not to be held to deprive the losing party of the privilege of moving for a new trial in the speediest and most convenient mode prescribed by the statute, unless its terms are such as to admit of no doubt that such was the intention of the legislature. We think the law demands no such construction; the enumeration in section 660 is not necessarily exclusive, and it is contrary to all considerations of justice and convenience to hold that it was intended to be. That a judge may and must consider on a motion for a new trial, made in advance of a statement, all evidence material to the grounds and specifications of the notice, whether reported or not, is something which the legislature may well have deemed too obvious to call for express enactment. And if such evidence is to be considered, it must go into the statement."

§ 393. The scope of inquiry may be limited by estoppel.

It has been previously seen that a new trial should not be granted as to matters not actually litigated between the parties at the trial. Matters covered by admissions made and stipulations entered into come within the principle of this rule. It would be violative of the settled rules of practice to permit a party to contradict on the motion the allegations of his pleadings or stipulations. But aside from the convenient and salutary rules of practice on the subject he would be held estopped from doing so. Accordingly, where in an action against a railroad company for the death of an employee caused by the negligence of an engineer, defendant, on the trial, admitted that accused and such engineer were not fellow-servants, it was held that defendant could not afterward, on application for a new trial, claim that such employees were fellow-servants.⁷¹ And it may be stated as to general principle that a new trial should

⁷¹ *Kansas & A. V. Ry. Co. v. Fitzhugh*, 61 Ark. 341, 54 Am. St. Rep. 211, 33 S. W. 960.

not be granted where its result, in consideration of the admitted facts of the case, could not be different from that of the former trial.⁷²

§ 394. Power of court to limit order to particular issues.

That the court has the power to limit the retrial, and consequently the scope of inquiry upon the motion, where, either by statute, or by common-law acceptance, a new trial is defined to be "a re-examination of an issue of fact," may be considered as settled.⁷³ And the court may limit the order for a new trial to the issues raised by a cross-complaint.⁷⁴ The supreme court of Montana holds that it is not only within the power of the trial court, but that it is its duty, in cases of separate causes of action separately stated, to limit the order to those improperly tried, denying it as to the others. In *Hamilton v. Nelson*,⁷⁵ it was held reversible error not to conform to that view. In *Ramsdell v. Clark*,⁷⁶ the court said: "Where the issue or issues in one cause of action have been properly tried, and those in another cause of action in the same suit have been improperly tried, it is the duty of the trial court, in passing upon a motion for a new trial, to grant it only as to those

⁷² *Gilbert v. Walker*, 64 Conn. 390, 30 Atl. 134; *Van Dorn v. Mengedoht*, 41 Neb. 525, 59 N. W. 800. In an action for debauchery of plaintiff's wife the jury returned a verdict for plaintiff, giving punitive, but no actual, damages. The plaintiff requested the court to instruct the jury to return a verdict for nominal actual damages, which on defendant's objection was denied, and the verdict received as returned. It was held that defendant having invited the error could not attack the verdict by motion to set the same aside: *Mills v. Taylor*, 85 Mo. App. 111.

⁷³ See *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724; *Duff v. Duff*, 101 Cal. 1, 35 Pac. 437; *Mountain Tunnel Co. v. Bryan*, 111 Cal. 36, 43 Pac. 410; *Fallbrook Irrigation Dist. (Directors of) v. Abila*, 106 Cal. 365, 39 Pac. 793; *Ramsdell v. Clark*, 20 Mont. 103, 49 Pac. 591; *Hamilton v. Nelson*, 22 Mont. 539, 57 Pac. 146; *Bennett v. Clossen*, 138 Ind. 542, 38 N. E. 46; *Smith v. Smith*, 57 N. Y. Supp. 774, 27 Misc. Rep. 252; *Sclaritz v. Morris* (Tex. Civ. App.), 35 S. W. 516; S. C., 36 S. W. 292.

⁷⁴ *Jacob v. Carter* (Cal.), 36 Pac. 381.

⁷⁵ 22 Mont. 539, 57 Pac. 146.

⁷⁶ 20 Mont. 103, 106, 49 Pac. 591.

issues which have been improperly tried, where this can be done readily, and without confusion resulting upon the retrial.⁷⁷ And the California supreme court takes the same view.⁷⁷

It has been previously shown⁷⁸ that a party may in a proper case limit the inquiry in the notice. Under the foregoing decisions, the movant would undoubtedly have the right to demand such limitation at the hearing, notwithstanding the absence of any limitation in the notice. The power and duty of the court herein to so order cannot be more extensive than that of the parties to demand.

§ 395. Power of court to grant as to one party and deny as to others.

The principle which supports the exercise of power to limit the retrial and range of inquiry on the motion to particular issues sustains the power to grant a new trial as to some parties while denying it as to others. Accordingly, in an action against joint defendants, where judgment by default had been rendered against one and judgment recovered against the others on the trial of the action, it was held not to be erroneous to grant a new trial as to the defendants who answered and deny it as to the defaulting defendant, although the motion for a new trial was made in the name of all the defendant.⁷⁹ And where, on a trial of four defendants jointly indicted, the state announced that it would claim no conviction as to two of them, and then examined these two as witnesses against the other two, it was held that, after the rendition of a verdict of guilty against all the defendants, the grant of a new trial as to the two examined as witnesses was not ground for a new trial as to the other two.⁸⁰ And it was held no error where there was a judgment against two defendants for a tort and the evidence made it clear that one of them was not liable in an action for tort, to set the verdict aside as to the one not liable and allow

⁷⁷ *Duff v. Duff*, 101 Cal. 1, 4, 35 Pac. 437. A new trial in proceedings under the Wright Irrigation Act is by the provisions of that act limited to issues improperly tried: Stats. 1889, p. 213.

⁷⁸ See ante, § 374.

⁷⁹ *Ex parte Lowerman & H. S. & P. Co.*, 2 Wash. 427, 27 Pac. 232.

⁸⁰ *Sims v. State*, 87 Ga. 569, 13 S. E. 515.

it to stand as to the other.⁸¹ To permit of such an order, however, the action must be, as to the parties to be affected by the order, severable as well as joint.⁸² It is a general rule in several states that where a plaintiff's motion is for a new trial against joint defendants and the judgment is proper against any one of them, it is proper to refuse a new trial as to all;⁸³ and, by parity of reasoning, that a joint motion should be overruled as to all parties joining therein, if any one of them is not entitled to a new trial.⁸⁴ In *Boehmer v. Big Rock Creek Irrig. District*⁸⁵ these decisions were briefly referred to but the court held that in order to apply the rule it was necessary that prejudice resulting from limiting the order must be shown.

While, as before stated, a new trial may usually be granted as to one defendant in an action, and the verdict and judgment be allowed to stand against others, where there is no reason for granting a new trial as to them, yet, where it appears that on the trial evidence was introduced as to transactions between

⁸¹ *Nashville St. Ry. Co. v. Gore*, 106 Tenn. 390, 61 S. W. 777. Where plaintiff moved for a new trial as a unit against all defendants without sufficient ground as to one, he cannot complain that the court severed the motion, and allowed it except as to such defendant: *Williams v. Kirby*, 81 Ill. App. 154. A defendant in a partition suit between cotenants, having a ground for a new trial as against one alleged cotenant, is not thereby entitled to a new trial as against the others: *McBride v. McClintock*, 108 Iowa, 326, 79 N. W. 83.

⁸² See *Maxwell v. Habel*, 92 Ill. App. 510; *Moreland v. Durocher*, 121 Mich. 398, 80 N. W. 284; *Albright v. McTighe*, 49 Fed. 817; *Sebran v. State*, 51 Ga. 164; *Sims v. State*, 87 Ga. 569, 13 S. E. 551; *Bank v. Williams*, 126 Ind. 423, 23 N. E. 75; *Brown v. Burrus*, 8 Mo. 26; *Heffner v. Moyse*, 40 Ohio St. 112.

⁸³ See *Prescott v. Haughey*, 152 Ind. 517, 51 N. E. 1051, 53 N. E. 766; *McDonald v. Bowman*, 40 Neb. 269, 58 N. W. 704; *Minick v. Huff*, 41 Neb. 516, 59 N. W. 795. This rule was applied in *Holborn v. Naughton*, 60 Mo. App. 100, but the cause of action was essentially joint and not severable.

⁸⁴ See *Holmes v. Tyler*, 3 N. Mex. 613, 45 Pac. 1129; *Johnson v. Winslow*, 22 Ind. App. 104, 53 N. E. 388; *Wines v. State Bank of Hamilton*, 22 Ind. App. 114, 53 N. E. 389; *Dorsey v. McGee*, 30 Neb. 657, 46 N. W. 1018.

⁸⁵ 117 Cal. 19, 46 Pac. 908. This subject is more fully discussed, ante, § 372.

the plaintiff and a defendant against whom the evidence was insufficient to sustain the verdict, which evidence would not have been competent against his codefendant; but which may have enhanced the damages awarded, a new trial should be awarded as to all the defendants.⁸⁶

§ 396. Power of court in order granting new trial to limit retrial to question of damages.

The trial court may not only award a new trial as to some of the parties, while denying it as to others, and grant it on certain issues relating to the merits, while allowing the verdict to stand as to others, but it may, in a proper case, limit the retrial to the question of the amount of the recovery. In a North Carolina case,⁸⁷ the court held that the second trial might be thus limited to the question of damages alone, though some of the matters involved in the other issues might have tended to mitigate the damages, reasoning, that whatever evidence was introduced on the first trial, on such other issues in mitigation of damages would be admissible on the second trial on the general issue as to damages.

§ 397. How far granting or refusing new trial discretionary.

One of the most difficult questions encountered in the practice is the extent of the trial court's discretion. It must be reckoned with at many stages of a litigated case, and especially in passing upon motions for new trial. This discretionary power does not exist, to any appreciable extent, where error⁸⁸ or that the decision is against law⁸⁹ are the grounds relied

⁸⁶ *Stand v. Griffith* (U. S. C. C.), 109 Fed. 597.

⁸⁷ *Benton v. Collins*, 125 N. C. 83; S. C., 47 L. R. A. 33, 34 S. E. 242.

⁸⁸ See *Hoyt v. Saunders*, 4 Cal. 345; *Bender v. Rinker*, 21 Wash. 636, 59 Pac. 504. In Colorado the judgment of trial judges as to how far an error may have affected the result is given consideration. In *Denver (City of) v. Jacobson*, 17 Colo. 497, 30 Pac. 246, it was said: "Having seen and heard the witnesses they are in position to determine how great or how little influence an error may have had on the verdict."

⁸⁹ See *Gwin v. Gwin* (Idaho), 48 Pac. 295, holding that when the special facts found by the jury are inconsistent upon a material issue, a new trial must be granted.

upon, but is given more or less consideration on appeal where other grounds are claimed to exist. The discretion has never been conceded to be absolute, however, no matter what the ground relied upon. In *Sacramento etc. Min. Co. v. Showers*,⁹⁰ where misconduct of the jury was the ground relied upon, the court said: "With us, the granting or refusing a new trial is not a mere matter of discretion." But the following is a fuller and more satisfactory expression of the same idea: "Though the trial court has large discretion in awarding or refusing new trials, which will not be interfered with except in case of abuse, yet, when a new trial is granted upon a particular ground, there must be some legal evidence that such cause for a new trial exists, and the ground must be a legal ground for granting a new trial."⁹¹

⁹⁰ 6 Nev. 291, 296. The rule in case of misconduct has been thus stated: "A motion for a new trial for misconduct of the jury lies in the discretion of the presiding judge unless he refuse to exercise it, when the facts proved required for some legal reason that he should do so, or refuse to receive evidence that should guide that discretion: *Commonwealth v. White*, 147 Mass. 76, 16 N. E. 707. But this seems to concede entirely too much to the discretion of the trial judge. It concedes all to him when the excepted conditions do not arise, as they rarely do. It is accounted for by the fact that in Massachusetts as in Oregon the order on a motion for new trial is not itself appealable: See *State v. Fitzhugh*, 2 Or. 227; *State v. McDonald*, 8 Or. 118. There are other methods, however, of having the action of the lower court reviewed in both states. The rule as to discretion has been somewhat modified in later Oregon cases: See *State v. Magers*, 36 Or. 39, 58 Pac. 892. In Colorado an application to set aside a judgment and for a new trial is addressed to the discretion of the court, and a gross abuse of discretion must appear in order to warrant interference by appellate courts: *Lee (Robt. E.) Silver Min. Co. v. Englebach*, 18 Colo. 106, 31 Pac. 771. Such discretion is not to be arbitrarily or illegally exercised: *Cook v. Doud*, 14 Colo. 483, 23 Pac. 906; *Klink v. People*, 16 Colo. 467, 27 Pac. 1062. Whether improper remarks of counsel are calculated to prejudice minds of jury is a question for trial court and except in cases of abuse discretion will not be disturbed: *Watson v. St. Paul City Ry. Co.*, 42 Minn. 46, 43 N. W. 904.

⁹¹ *Braithwaite v. Aikin*, 2 N. Dak. 57, 49 N. W. 419. In *Clifford v. Denver & South Park R. Co.*, 12 Colo. 135, 20 Pac. 333, it was held that the statute vested the trial courts with a discretion, but that it was not arbitrary, and was confined to cases of insufficiency, and the like.

Many meanings and shades of meaning are discernible in judicial expressions, involving the subject, which range all the way from ultra-conservatism to the wildest extravagance. At any rate, the responsibility of reviewing the case presented on the hearing rests with the trial court. Where a verdict of a jury does not meet the approval of the trial judge, it is his duty to set aside the verdict and grant a new trial.⁹² And it

⁹² *Condee v. Gyger*, 126 Cal. 546, 59 Pac. 26; *Byrbee v. Dewey*, 128 Cal. 322, 60 Pac. 847; *Jones v. Saunders*, 103 Cal. 678, 37 Pac. 649; *Sherman v. Mitchell*, 46 Cal. 576; *Bjorman v. Ft. Bragg Redwood Co.*, 92 Cal. 500, 28 Pac. 591; *Curtiss v. Starr*, 85 Cal. 376, 24 Pac. 806; *Wilson v. California Cent. R. R. Co.*, 94 Cal. 166, 29 Pac. 861; *Phillpott v. Blaisdel*, 8 Nev. 61; *Serles v. Serles*, 35 Or. 289, 57 Pac. 634; *Pierson v. Thompson*, 4 Kan. App. 173, 45 Pac. 944; *Myers v. Knabe*, 4 Kan. App. 484, 46 Pac. 472. The rule is the same whether the motion is heard by the judge who tried the case or by some other judge, whose only knowledge of the facts is obtained from the record: *Jones v. Sanders*, *supra*; *Macy v. Davilla*, 48 Cal. 646; *Bander v. Lynch*, 59 Cal. 99; *Blum v. Sunol*, 63 Cal. 341; *Wilson v. California C. R. R. Co.*, 94 Cal. 166, 29 Pac. 861. It was argued in *Sherman v. Mitchell*, *supra*, that where there is evidence to support the verdict it was error to grant a new trial though the evidence was conflicting. But the court said that such was not the correct rule nor the rule recognized by the supreme court; and the court adopted as the correct principle the following from *Dickey v. Davis*, 39 Cal. 569: "In this court, when there is a substantial conflict in the evidence, we decline to set aside a verdict or finding of facts as being contrary to the weight of evidence, solely because we have had no opportunity to observe the manner of the witnesses, and to decide upon their credibility. But this reason does not apply to the district judge, and though it is the peculiar province of the jury to decide upon the facts submitted to them, generally, in doubtful cases, the verdict ought not to be set aside as contrary to the weight of the evidence; nevertheless, if the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony." And in *Phillpott v. Blaisdel*, *supra*, the court, after setting forth the facts as stated by the trial judge, said: "The correctness of its exposition of the facts and testimony is not assailed; but it is argued 'that the question is here—as it was below—is the evidence insufficient in law; that it is error to grant a new trial upon the ground of insufficiency of the evidence, where there is a substantial conflict of testimony, for

is error to overrule the motion for a new trial on the mere ground that the court wishes the supreme court to pass upon the evidence in the case, since the supreme court has no jurisdiction to pass on such evidence in the first instance.⁹³ On the other hand, when a judgment and verdict are in accordance with the evidence, and there is no substantial conflict in it upon any material issue, and no error has intervened, the court has no right to grant a new trial.⁹⁴

When the ground relied upon is that the damages awarded by the verdict of the jury are excessive, the ruling of the court thereon will not be interfered with unless it appears affirmatively from the record that such discretion has been improperly exercised.⁹⁵

the jury and not the court must respond to questions of fact.' I do not so understand the law. By a rule almost coeval with the maxim quoted—certainly one as deeply rooted in the law—the *nisi prius* judge has jurisdiction, on motion for a new trial to decide, as a question of fact, whether the scale of evidence which leans against the verdict very strongly preponderates: 3 Blackstone's Commentaries, 392. It is not enough to authorize the appellate court to reverse such decision that the evidence appears fully to support the verdict. It will only be reversed for the most cogent reasons, such as a conclusive preponderance of evidence in favor of the verdict.'"

⁹³ *East Tennessee V. & G. Ry. Co. v. Lee*, 95 Tenn. 388, 32 S. W. 249.

⁹⁴ *Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540; *Scott v. Haines*, 4 Nev. 426.

⁹⁵ *Kohler v. Fairhaven & N. W. Ry. Co.*, 8 Wash. 452, 36 Pac. 253, 681, followed and approved in *Rigney v. Tacoma L. & W. Co.*, 9 Wash. 247, 37 Pac. 297. In the first case the court said: "Under the provisions of our statute it is made the duty of the trial court, when a proper motion has been interposed, to determine the question as to whether or not the damages awarded by the jury are excessive. In performing this duty the court must determine as to the effect of the evidence introduced in the course of the trial. From such evidence it must, as a question of judicial discretion, determine whether or not the damages as assessed by the jury are so excessive as to make it appear that they were awarded under the influence of passion or prejudice. It is a universal rule that when a matter is left to the discretion of a court, its exercise of such discretion will not be interfered with by an appellate court unless it is made affirmatively to appear from the record brought up on ap-

The matter of granting or refusing new trials is so far a matter of public interest, that the province of the court cannot be invaded or taken away by stipulation; and a new trial may be refused notwithstanding the consent of counsel that a new trial be granted.⁹⁶

There is one condition under which an order of the trial court is absolutely exempt from interference, or even review, and that is where the maxim, "*De minimis non curat lex*" applies; for instance, where the amount involved was only four dollars,⁹⁷ and where the evidence makes a case for only nominal damages, and the verdict is for defendant, an order denying a new trial should not be interfered with.⁹⁸

§ 398. Insufficiency of evidence at hearing.

Insufficiency of evidence to sustain the verdict, one of the important grounds for new trial, is a distinct matter from insufficiency of evidence on motion for new trial to support the order thereon. In so far as the question relates to the duty of the trial court, it has been discussed at length under the various heads relating to grounds for new trial, required to be presented on affidavits, with particular reference to the essential contents of the affidavits. But, inasmuch as nearly all views, in so far as they relate to the lower court, are subordinate to the court's discretion, which can only be interfered with on appeal,

peal that such discretion has been improperly exercised. We see no reason for holding that in exercising the particular discretion vested in a trial court in determining as to whether or not there should be a new trial its decision should be given less force than in other matters, for while it is true that the verdict of a jury is presumably warranted by the evidence until the contrary is made to appear, the statute has made it the duty of the lower court to review their action, and when it has done so, and in the exercise of the discretion vested in it determined that it was not warranted, the presumption as to its correctness is taken away, and the decision of the court must stand unless the appellate court is satisfied from all the circumstances surrounding the case that in so deciding the court made a mistake."

⁹⁶ Phelan v. Ruiz, 15 Cal. 90; Gunn v. Durker, 41 Kan. 144, 21 Pac. 156; Rock Island (City of) v. McEnery, 39 Ill. App. 218.

⁹⁷ York v. Stiles, 21 R. I. 225, 42 Atl. 876.

⁹⁸ People v. Petrie, 191 Ill. 497, 85 Am. St. Rep. 268, 61 N. E. 499, affirming S. C., 94 Ill. App. 652.

a further discussion is deferred to a more appropriate connection.⁹⁹

§ 399. Legal limitations imposed upon court in deciding motion.

The only absolute limitations imposed upon the exercise of the jurisdiction are those which circumscribe the grounds upon which the jurisdiction may be invoked. The question of error therein is distinct.

In some of the states, there are statutes requiring the orders granting motions for new trials to state the grounds upon which they are granted. Such statutes have been generally construed as directory merely. An order failing to state the grounds is not void,¹⁰⁰ and even where such statutes are treated as mandatory, it is held not necessary to follow the specifications. Thus, where the movant had reserved many exceptions to rulings during the trial, and presented them in his bill of exceptions, it was held to be a sufficient compliance with the statute requiring the court, in its order granting a new trial, to state the ground upon which it was granted, to specify generally that errors were committed during the trial prejudicing the movant.¹⁰¹ The provision of the old California Practice Act appears to have been held directory for the principal reason that compliance with it was a matter of no particular consequence, being merely a matter of convenience; that, if held mandatory, in case of noncompliance, then, an order on the motion, however correct it might be, must be reversed on appeal; further, that the rights of the parties under the order should not be made to depend upon whether the court performed or omitted to perform his duty in this respect, and finally, that, if an order granting a new trial could be sustained upon any ground, it was the duty of the appellate court to sustain it, although the reasons stated in its support were unfounded; and

⁹⁹ See post, § 683.

¹⁰⁰ *Coleman v. Davis*, 13 Colo. 98, 21 Pac. 1018; *Borkheim v. Fireman's Fund Ins. Co.*, 38 Cal. 505; *Grant v. Spencer*, 1 Mont. 136.

¹⁰¹ *Gitelson v. Weisburg*, 36 Misc. Rep. 214, 73 N. Y. Supp. 195. See *O'Meara v. Swanson*, 62 Mo. App., holding that a trial judge may be compelled by mandamus to state the reasons for his order on the motion.

if the motion were denied, it was, nevertheless, the duty of the appellate court to examine all the grounds upon which a new trial was sought.¹⁰² But, aside from the question of whether such statutes should be held to be mandatory or directory merely, it is often of great importance where the court grants a new trial, that all the grounds alleged be passed upon in the order. If the court grants a new trial for errors in law, accruing during the trial, and neglects to pass upon a specification of insufficiency of the evidence, there being a conflict, or upon any other ground wherein discretion largely enters, the appellate court cannot investigate as to such other point, owing to its want of power to originally try and adjudicate thereon.

Trial courts oftener than otherwise select one ground and expressly grant the motion on that ground alone. Now, if that be the only point in the decision of which discretion is

102 *Borkheim v. Fireman's Fund Ins. Co.*, 38 Cal. 505. See *Bender v. Rinker*, 21 Wash. 636, 59 Pac. 503. The learned opinion by Chief Justice Gordon in the second of these cases sheds considerable light upon the general subject, and is in part as follows: "The order is general in its terms, and does not specify any particular ground upon which the new trial was awarded. Nor do counsel agree as to the ground upon which the lower court predicated the conclusion. Under the circumstances, we are unable to determine upon which ground of the motion the new trial was granted. If it was because of the alleged insufficiency of the evidence to justify the verdict, that was a matter within the discretion of the lower court, who heard and saw the witnesses; and the conclusion reached thereon would not be disturbed by this court, excepting from an abuse of discretion, and where, as here, the evidence at the trial is conflicting this court will not disturb the conclusion of the trial court upon such a motion. On the other hand, if it was for alleged errors of law occurring at the trial, and it could be ascertained from the record that such were the reasons for awarding the new trial, an appeal from such an order would present a clear-cut legal question, and a ruling of the lower court in such a case would not involve the exercise of any discretion, and this court would unhesitatingly review it. The difficulty with the present case is that it is impossible to determine whether the new trial was awarded upon a ground concerning which the law has invested the lower court with a discretion, or not; and under such circumstances, following our previous decisions, the order must be affirmed." See, also, *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907; *Corbitt v. Harington*, 14 Wash. 197, 44 Pac. 132; *Friedman v. Manley*, 21 Wash. 43, 56 Pac. 832; *Holgate v. Parker*, 18 Wash. 206, 51 Pac. 368.

an element, it is immaterial that the other grounds are not expressly passed upon. But suppose, as often happens, the ground selected be that the verdict or decision was against law, or that errors in law were committed during the trial, and such other grounds as that the evidence was insufficient, or that the damages were excessive, etc., are not passed upon. The decision of the trial judge on the selected point may turn out to be erroneous on appeal, and yet, the party who obtained the new trial would be deprived of the right to a new trial upon the discretionary grounds, whereas, if the trial court had examined them, and passed upon them in the order, the record on appeal might have shown the correctness of the award of a new trial on these grounds also, and have secured an affirmance notwithstanding that the decision upon the selected ground turned out to be erroneous. It is a matter of less consequence where the trial court denies the motion whether the grounds are expressly and specifically passed upon or not, for then it must be assumed that all the grounds alleged were passed upon, and that the motion was denied upon all of them.

It is immaterial that the order does not recite the grounds upon which it is made, where the record shows that the proceeding lapsed by reason of a failure to file and serve the notice in time or otherwise.¹⁰³ But, where an order granting a new trial, limits the retrial to particular issues, it is of importance that it define and specify the particular issues upon which the new trial is granted. If the appellate court is unable, in case of such an order, to definitely determine the particular issues intended by the trial judge to be retried, and finds it necessary to affirm the order, it will remand the case with directions to retry the whole case. In *Mountain Tunnel G. M. Co. v. Bryan*,¹⁰⁴ the court, after approving the practice of limiting the retrial to part of the issues in proper cases, and emphasizing the importance of defining the issues to be retried with great certainty, proceeded as follows: "This should be done in order that both counsel and the trial court, and this court upon appeal, may know exactly the questions involved within the

¹⁰³ See *German Savings Bank v. Cady*, 114 Iowa, 228, 86 N. W. 277.

¹⁰⁴ 111 Cal. 36, 43 Pac. 410.

scope of the order. The order in this case uses the word 'proceedings' where probably the word 'findings' was intended, and also the word 'issues' was contemplated. If these are not clerical errors, and we have no way of determining the fact, then the order is so indefinite that it should be held to be general in its terms; but, even conceding these things to be purely clerical mistakes, still, as a rule which should be invariably followed, an order granting a new trial pro tanto should not, as in this case, grant the order as to the issues covered by certain numbered findings of fact; for such an order leaves the matter open as to what issues are really included within its scope, and often makes it difficult, if not impossible, for the trial court, or for this court, to say what issues the court had in mind when the order was made. As a striking illustration of the soundness of our position, we refer to finding of fact No. 29, found in this record. A new trial was ordered by the trial court as to the issue or issues involved therein, but upon examination of that finding, we are entirely unable to ascertain the particular tract of land to which reference is there had. In the present case, by our construction of the order, it grants a new trial as to so many important questions raised by the pleadings that we deem it the better course that the whole case shall be retried. We are especially firm in this conclusion when we take into consideration that the defects appearing on the face of the order, and the doubts which would probably arise in the minds of both court and counsel as to the exact issues which were required to be retried under the directions therein contained." Nevertheless, orders on the motion will be liberally construed in order to give them effect. And if sufficient appears to make it certain that the court intended to overrule the motion and refuse a new trial, it is not necessary that the order shall expressly so state.¹⁰⁵

The order of the court entered upon its minutes is the only evidence of the action of the court in granting the new trial, and such order is to be measured by its terms and not by the reasons which the court may give for it. The order will not be deemed limited by any opinion filed, unless an intention to

¹⁰⁵ McMahon v. Polk, 10 S. Dak. 296, 73 N. W. 77.

limit the order is expressed therein.¹⁰⁶ And yet, as before stated, if the order and the reasons for making it are combined and the opinion contains recitals which show that the order should have been different, there being nothing contradictory to such recitals in the record, the order will be reversed without further investigation.¹⁰⁷

§ 400. Finality of decision on the motion.

In the matter of rehearings or retrials of the motion for new trial after an order has been made disposing of it, the powers of the courts of the respective states, are not uniform. Even as between those states where the proceeding is instituted by notice and motion under full statutory directions, there is a difference herein. In New York, it is held that the court may grant a reargument or rehearing to a party whose motion has been denied, and thereupon reverse the prior order.¹⁰⁸ In other states having the same system of statutes governing new trials, a contrary view prevails. But generally, where the proceeding for a new trial is inaugurated by petition, or notice of intention, in many respects the commencement of an action, the rule of *res adjudicata* is applied with reference to the original order.¹⁰⁹ In California, it has been firmly established by several decisions that the court has no power to reopen the question of granting or denying the motion after disposing of it. In *Carpenter v. Superior Court*,¹¹⁰ it was decided that "Where a cause has been regularly heard and decided, it can be reviewed only in the mode provided by the statute. The trial court cannot, upon an application not authorized by statute, set aside its decision for mere error not amounting to want of jurisdiction." In *Lang*

¹⁰⁶ *Newman v. Overland Pacific Railway Co.*, 132 Cal. 73, 64 Pac. 110; post, § 693.

¹⁰⁷ Ante, § 693.

¹⁰⁸ *Matthews v. Heidtfelder*, 60 Hun, 521, 15 N. Y. Supp. 165, But see *Reich v. McCrea*, 26 N. Y. St. Rep. 926, 7 N. Y. Supp. 600, holding that when the trial judge refuses a motion for new trial, a new trial cannot be granted on affidavits by another judge.

¹⁰⁹ See *Houston v. Kidwell*, 12 Ky. Law Rep. 386, 14 S. W. 377.

¹¹⁰ 75 Cal. 596, 19 Pac. 174.

v. Superior Court,¹¹¹ the court said: "The demurrer and the motion for a new trial had been disposed of, and then, on what is called a 'rehearing' the case was again brought before the court, and a new order made. This is a new practice, with which we are not familiar, and we know of no statute authorizing it. When a motion for a new trial is made and passed upon—either granted or denied—it is not competent for the court afterward to set its rulings aside and make another order in the cause." In one case the court assigns as an important reason for the rule that "there must be some point where litigation in the lower court terminates, and the losing party is turned over to the appellate court for redress."¹¹² After a review of the decisions, the court so expressed itself in *Burnham v. Spokane Mercantile Co.*¹¹³ The same rule is enforced in Nevada,¹¹⁴ and elsewhere.¹¹⁵ It is applied as well where there has been a change of judges after a disposal of the motion as where the application to reopen the question is made before the same judge.¹¹⁶ But it was held that an order not appealed from, denying a previous motion to dismiss the proceeding for a new trial, made two years previously to a renewal of the motion, was not *res adjudicata* upon the renewed motion, unless it appeared that the order made thereon was made upon the same facts which existed when the previous motion was made, and that the party opposing, had the burden of showing that the facts were the same.¹¹⁷ But a ruling, in order to be a bar to a future determination of the question of

111 71 Cal. 491, 12 Pac. 306; citing *People v. Center*, 61 Cal. 194; *Coombs v. Hibberd*, 43 Cal. 453; *Rogers v. Hoenig*, 46 Wis. 361, 1 N. W. 17. See, also, *Egan v. Egan*, 90 Cal. 15, 27 Pac. 22; *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670, applying rule in criminal case; a different rule was recognized in *Hart v. Burnett*, 10 Cal. 64.

112 *Coombs v. Hibberd*, 43 Cal. 453.

113 18 Wash. 207, 212, 51 Pac. 363.

114 *Crosby v. North Bonanza Silver Min. Co.*, 23 Nev. 70, 42 Pac. 583.

115 See *Lookabaugh v. Cooper*, 5 Okla. 102, 48 Pac. 99; *Jeansch v. Lewis*, 1 S. Dak. 609, 48 N. W. 128.

116 See post, § 607.

117 *Doon v. Tesh*, 131 Cal. 406, 63 Pac. 764.

granting or refusing a new trial must be one on motion to which the litigants are parties in legal sense. Accordingly, it was held that an irregular motion for a new trial made without notice, and without statutory authority therefor, and which was, at best, the calling of the court's attention to what it might do of its own motion in setting aside the verdict under section 662 of the Code of Civil Procedure, was merely nugatory, and was not *res adjudicata* to prevent the hearing of a regular motion for new trial made upon the statutory grounds therefor.¹¹⁸

It appears that the above rule on the subject of reopening the motion does not apply where motions for new trial must be disposed of at the term of the court at which the trial is had, and that in such jurisdictions, a second application will be entertained upon grounds discovered since the prior motion was disposed of and at the same term.¹¹⁹

§ 401. Setting aside for mistake, inadvertence, etc.—Amendment of finding in lieu of granting new trial.

The foregoing rule does not conflict with the power of courts to set aside orders on the motion upon proper showing of mistake, inadvertence and the like, under statutes such as are generally found permitting it.¹²⁰

A limited power of amendment of the court's own motion is sanctioned. But such amendment must be confined to the correction of clerical errors and omissions. An order which purports upon its face to be amendatory of a former order granting a new trial, and to be made for the purpose of correcting the former order, in effect supersedes the original order and renders it the only order of the court upon a motion for a new trial; and it must receive the same consideration as if the original order had been entered in the terms of the amended order.¹²¹ And it was held that a *nunc pro tunc* order of the

¹¹⁸ *Anglo-Nevada Assur. Corp. v. Ross*, 123 Cal. 520, 56 Pac. 335.

¹¹⁹ *East Tennessee etc. R. Co. v. Winters*, 85 Tenn. 240, 1 S. W. 790. See, also, *Molair v. Port Royal etc. Ry. Co.*, 31 S. C. 510, 10 S. E. 243.

¹²⁰ See post, § 607.

¹²¹ *Garoutte v. Haley*, 104 Cal. 497, 38 Pac. 194.

trial court, amending an order denying a new trial after the taking and perfecting of an appeal therefrom, by adding a recital to the effect that the motion for a new trial was based and submitted on a bill of exceptions filed at the date of the hearing of the motion, merely corrected the first order, and took effect as of the date of the order corrected; and that a contention that the last order superseded the first, and was the only order denying a new trial, which should have been appealed from instead of the first order, was untenable. In legal effect, there was but one order.¹²²

The court has the option, in some cases, to either correct a finding, with consent of the party whom it favors, or to grant a new trial for insufficiency of evidence to support it.¹²³

§ 402. Court cannot substitute its opinion for verdict of jury.

There is an important distinction to be observed, however, between the correction of findings of fact which the court has itself made to cure an inadvertent omission, or to substitute what the court intended to, and did in fact find, for what, on the face of the findings, appears to have been found, and the reversal by the court of its own decision in whole or in part by the making of new findings, or materially changing the legal effect of those deliberately made and filed.¹²⁴ The latter is not permissible. It will be elsewhere shown to what extent courts may direct juries to correct verdicts returned by them into court.¹²⁵ The court may undoubtedly direct the correction of purely clerical omissions and mistakes apparent on the face of the verdict. That the court cannot, by order, under the guise of such correction, make material modifications of the verdict in lieu of granting a new trial, thus substituting its opinion for that of the jury, is well settled. In an action to recover damages for the diversion of water, and for an injunction, the complaint alleged that plaintiff was entitled to the use of five hundred inches, measured under a four-inch pressure, of the waters of the creek in question; and the jury

¹²² *Combination Land Co. v. Morgan*, 95 Cal. 548, 30 Pac. 1102.

¹²³ *Rosina v. Trowbridge*, 20 Nev. 105, 17 Pac. 751.

¹²⁴ This subject fully discussed elsewhere. See post, § 608.

¹²⁵ See post, §§ 583, 585.

found that the plaintiff was entitled to eight hundred inches under a four-inch pressure, and that he had been damaged in the sum of one thousand dollars by the diversion of said waters. The plaintiff was permitted by the court below to remit the excess of three hundred inches, and judgment was entered accordingly. It was held that the judgment as entered could not stand; that if the nature, of the case admitted of the remitting by the plaintiff of a portion of the water awarded him by the jury, he was not entitled to judgment for one thousand dollars damages.¹²⁶ So where, upon a motion for a new trial upon the ground that a verdict of murder in the first degree was contrary to the evidence, the court found the evidence insufficient to support the verdict, it was held to be beyond the power and discretion vested in the court to substitute its own finding that the crime was murder in the second degree and give judgment and sentence accordingly.¹²⁷

A dicta in a recent California case is in conflict with the rule under consideration, and should not be permitted to mislead. In *Thomas v. Gates*,¹²⁸ the opinion adopted by the court, after speaking of the rule that where there is a conflict of evidence, the lower court has power to set aside the verdict and grant a new trial, proceeded thus: "In this case the court below, in the exercise of such discretion, modified the verdict, and, as it now stands supported by evidence on every important issue, we cannot, under the rule, disturb it." But this view is obviously unsound, in view of what immediately precedes in this section.¹²⁹

§ 403. Effect of adjournment of term upon power of court to decide motion.

The cessation of the power of the court over cases tried at a term of court after adjournment is a matter to be considered in some of the jurisdictions where stated terms are held. Thus it was held that the Arizona statute which requires a motion

¹²⁶ *Dougherty v. Haggin*, 61 Cal. 305.

¹²⁷ *State v. Symes*, 17 Wash. 596, 50 Pac. 487.

¹²⁸ 126 Cal. 1, 3, 58 Pac. 315, per Commissioner Cooper.

¹²⁹ See, also, next section. In *Chalmers v. Chalmers*, 81 Cal. 81, 83, 22 Pac. 395, such power was expressly denied to the trial court.

for new trial to be determined at the term in which it is made, was mandatory, and that, if the motion were not so determined, it was discharged at the end of the term by operation of law.¹³⁰ But a continuance of the motion at the term at which it is filed is action on it; within the purview of the statutes of most of the states having the system of court terms and constituting the motion for new trial a mere incident of the trial.¹³¹ In New Mexico, it is provided by rule of court that motions for new trial shall be argued or submitted and determined at the term at which the case is tried, unless the court expressly continues the motion, and that no continuance shall be for more than thirty days for argument, submission, and disposition by the court. It was held that a failure of the court to pass on a motion within thirty days did not divest jurisdiction over it, but the court would be considered to have deferred its action for good cause, within its power to further continue it.¹³²

Where, in such jurisdictions, the motion is continued, the movant should also take proper steps at the same term to obtain the benefit of the proceedings and evidence in the case. If his motion be for a new trial on the minutes, and the motion be continued beyond the term, it becomes a motion for a new trial on the record. But, although on the hearing of such a motion, where no bill of exceptions has been settled, the testimony given at the hearing cannot be considered, yet the objection must be taken at the hearing; otherwise, it will be held to have been waived.¹³³

¹³⁰ *Ruff v. Hand* (Ariz.), 24 Pac. 257. Under Revised Statutes of Arizona paragraph 836, providing that all motions for new trials shall be made within two days after the rendition of judgment, a court, while not required to hear such a motion filed after such time has elapsed, may do so at any time during the term at which judgment was rendered: *Svea Ins. Co. v. McFarland* (Ariz.), 60 Pac. 936.

¹³¹ See *Head v. Randolph*, 83 Mo. App. 284. When the application for new trial is made during the term in proper time, and the court then orders the hearing continued, the mere failure of the clerk to enter the order of continuance will not defeat the right of the party to a hearing. The court may at the hearing cause the proper entry to be made *nunc pro tunc*: *Ex parte Humes*, 130 Ala. 201, 30 South. 732.

¹³² *Pearce v. Strickler*, 9 N. W. 46, 49 Pac. 727.

¹³³ *Hinton v. Coleman*, 76 Wis. 221, 45 N. W. 26.

§ 404. Conditional orders—Power of court to make.

The most general rule that may be stated under this head is that where the verdict of a jury is, in view of the evidence clearly wrong in matter of amount, quantity, or items included, the court may give the party in whose favor the verdict is returned, the option of consenting to a remission of the excess, or of submitting to an order granting a new trial. This power has been often decided by appellate state courts to be a component of the jurisdiction of trial courts.¹³⁴ The constitutionality of its exercise has withstood the test of attack based on the ground that it was a deprivation pro tanto of the right to trial by jury, in a case carried to the supreme court of the United States.¹³⁵ Damage cases constitute the most important class calling for the exercise of this power.

Although the power of trial courts herein had been strongly

¹³⁴ *Doolin v. Omnibus Cable Co.*, 125 Cal. 141, 57 Pac. 774; *Thomas v. Gates*, 126 Cal. 1, 58 Pac. 315; *Etchas v. Orena*, 121 Cal. 270, 53 Pac. 798; *Sherwood v. Kyle*, 125 Cal. 652, 58 Pac. 270; *Davis v. Southern Pac. Co.*, 98 Cal. 13, 32 Pac. 646; *Battelle v. Connor*, 6 Cal. 140; *Benedict v. Cozzens*, 4 Cal. 381; *Southern Pac. Co. v. Tomlinson (Ariz.)*, 38 Pac. 710; *Teller v. Hartman*, 16 Colo. 447, 27 Pac. 947; *Sills v. Hawes*, 14 Colo. App. 157, 59 Pac. 422; *Hochmark v. Richler*, 16 Colo. 263, 26 Pac. 818; *Consolidated Gregory Co. v. Rober*, 1 Colo. 511; *Winne v. Colorado Springs Co.*, 3 Colo. 161; *Duncan v. Whedbee*, 4 Colo. 145; *Blissel v. Cushman*, 5 Colo. 78; *Chicago Title & Trust Co. v. O'Marr*, 25 Mont. 242, 64 Pac. 506; *Cunningham v. Quick*, 10 Mont. 462, 26 Pac. 184; *Kennedy v. Oregon Short Line R. Co.*, 18 Utah, 325, 54 Pac. 988; *McDonagh v. Great Northern Ry. Co.*, 15 Wash. 244, 46 Pac. 334; *Winter v. Shoudy*, 9 Wash. 52, 36 Pac. 1049; *Rigney v. Tacoma L. & W. Co.*, 9 Wash. 245, 37 Pac. 297; *Whaley v. Broadwater*, 78 Ga. 336; *American Wine Co. v. Brasher Bros.*, 13 Fed. 595; *Marsh v. Union Pac. R. Co.*, 9 Fed. 873; *Cleveland etc. Ry. Co. v. Geckett*, 11 Ind. App. 547, 39 N. E. 429; *Baxter v. Cedar Rapids (City of)*, 103 Idaho, 599, 72 N. W. 790; *Benson v. Wilmington (City of)*, 9 Houst. (Del.) 359, 32 Atl. 1047; *Dayton (City of) v. Gardner*, 19 Ky. Law Rep. 302, 40 S. W. 779; *Ellis v. Mackiecoast Co.*, 60 Mo. App. 67; *Bishop v. Autographic Register Co.*, 46 N. Y. Supp. 97, 19 App. Div. 268. "The practice of refusing to enter judgment upon verdicts unless a portion is remitted is so common, and such practice so promotive, not only of justice but of an ending of litigation, that it is almost essential to the proper conduct of a jury trial that the courts should possess such power": *Illinois Cent. R. Co. v. Robinson*, 58 Ill. App. 181.

¹³⁵ *Arkansas Valley Land etc. Co. v. Mann*, 130 U. S. 69; S. C., 9 Sup. Ct. Rep. 458.

affirmed in California prior to the decision in *Davis v. Southern Pac. Co.*,¹³⁶ any remaining doubt on the subject was there removed. The court, after a review of its prior decisions, said: "Considering the foregoing authorities, and others not cited, it would be almost as great a stretch of judicial authority for us to undertake to overthrow this long established practice, as it would be to undertake to dispense with a statute." The supreme court of Wisconsin thus expounds the rule: "In naming a sum for which plaintiff may take judgment, as a condition of denying defendant's motion for a new trial, the right of the defendant to a jury trial is not invaded, if the amount be placed as low as in all reasonable probability the jury found by their verdict, independent of the prejudicial element; that is, in such a case, the court should not undertake to say what sum of money will measure plaintiff's loss, but what sum the jury said by their verdict, stripped of its prejudicial elements, and giving the defendant the benefit of reasonable probabilities in respect to the amount of the recovery will measure such loss."¹³⁷ The authorities agree upon the abstract principle that the rule does not admit of an invasion by the court of the province of the jury. But, starting from this common ground, different conclusions are reached; the large preponderance of authority being to the effect that even in the absence of any settled legal standard of measurement applicable to the particular case, the court may differ with the jury as to what the evidence shows the amount of recovery should be, and may direct a remittitur of the excess or a new trial as the alternative of a refusal to remit. The reason supporting this view is that the court, having the power to determine whether or not the amount awarded is excessive, and, if found so, to award a new trial, has the included power to determine upon a reasonable amount and, of course, the amount of the excess. The contrary view, briefly stated, is that it is only when it may be determined by fixed rules and principles of law how much a verdict is excessive, that a remission of the excess may be received in answer to a motion for a new trial on the ground of

¹³⁶ 98 Cal. 13, 32 Pac. 646.

¹³⁷ *Baxter v. Chicago etc. Ry. Co.*, 104 Wis. 307, 80 N. W. 644.

excessive damages.¹³⁸ In consonance with this view, where counsel, in addressing the jury, had brought before them facts not in evidence, and extraneous matters calculated to arouse prejudice, and divert their minds, and the court, on motion for a new trial, had stated that the verdict was grossly excessive, and probably given under the influence of passion and prejudice, it was held error to allow a remittitur of one-half the verdict, and enter judgment for the remainder, and that a new trial should have been unconditionally granted.¹³⁹ The reasoning underlying such decisions is that the misconduct may have been responsible for a verdict against the defendant for any amount whatever, and its effect upon the amount was a secondary consideration not possible of computation and not proper to be considered until the main question has been properly settled by granting a new trial.

The court cannot, on an order requiring the plaintiff to remit a portion of the verdict which the court considers excessive, also impose any unreasonable terms upon the defendant, or deny him the right to a new trial on the ground of errors occurring during the trial which would entitle him to a new trial without regard to the excess.

¹³⁸ *Gulf etc. Ry. Co., v. Redecker*, 75 Tex. 310, 16 Am. St. Rep. 887, 12 S. W. 855. The following exposition of the same idea is equally sound. The court cannot order a remittitur of a part of the damages found by the jury, upon condition that if they be not remitted, a new trial will be granted to the defendant unless the evidence furnishes some data by which the smaller sum suggested by the court can be rightly and definitely ascertained: *Unfried v. Baltimore etc. R. Co.*, 34 W. Va. 260, 12 S. E. 512.

¹³⁹ *Atchison Topeka etc. Co. v. Dwelle*, 44 Kan. 394, 24 Pac. 500; *Steinunchtel v. Wright*, 43 Kan. 307, 23 Pac. 560. See, also, *Murray v. Leonard*, 11 S. Dak. 22, 75 N. W. 272. The power to require a remittitur in such cases as an alternative to granting a new trial is asserted in Utah, where it is held that the overruling of a motion for a new trial upon the ground of excessive damages, upon condition that plaintiff remit a certain sum from the verdict and judgment, is the exercise of a supervision which courts have in certain cases over verdicts, and is not such a determination by the court of the fact that the damages were excessive as to taint the whole verdict: *Riddon v. Union Pac. R. Co.*, 5 Utah, 344, 15 Pac. 262. To same effect, *West Chicago St. Ry. Co. v. Wheeler*, 73 Ill. App. 368.

The principle underlying the above decision is but an application of the well-settled rule that, before the court may exercise the power now being considered, there must be before it a case calling for its exercise; in other words, before the court can require the successful party to submit to the alternative of a remittitur or a new trial, there must appear an adequate cause for granting a new trial, if the question of a remittitur were entirely eliminated. Thus, in *Patterson v. Ely*,¹⁴⁰ the defendant had gone to trial on an answer which contained only a general denial of the allegations of the complaint, the statute providing that, without specific denials, the material allegations of the complaint should "for the purposes of the action be taken as true." In delivering the opinion, Chief Justice Field said: "There was no evidence introduced on the subject, the entire claim resting upon the uncontroverted allegation of the complaint. It is not like the case where, from the want of all evidence upon the subject of damages, or from the evidence being entirely incompetent, the court may impose, as a condition of allowing the verdict in other respects to stand, the remitting of the damages found. Nor is it like the case where the court may differ from the jury upon the effect of the evidence, and, therefore, properly require a reduction of the damages recovered. It is a case upon an admission by the record. If good for anything, it is good for the entire amount specified." In an action for professional services, the defendants moved for a new trial, because of an excessive verdict. The motion was granted, "unless plaintiff elected to remit a certain sum, and defendants would accept it as modified." The defendants refused to accept the offer, and the motion was denied, the order reciting that the verdict was sustained by a preponderance of evidence, "unless as to the amount of the verdict." It was held that as the language of the trial judge clearly showed his belief that the verdict was excessive, which belief was warranted by the evidence, the defendants were entitled to have the verdict reduced without the imposition of the terms proposed, which were that the amount as reduced should be accepted as finality.¹⁴¹

¹⁴⁰ 19 Cal. 28, 35.

¹⁴¹ *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880.

The general power may be exercised in cases of defendants opposing a new trial in like manner and to the same extent as where the new trial is sought by the defendant and resisted by the plaintiff; and in a proper case the defendant may be compelled to elect between a release of part of the benefit given him by the verdict, and submission to the award of a new trial to the plaintiff.¹⁴² Where a judgment for a defendant in an action to quiet title included, by mistake, property which should not have been included, the court granted plaintiff a new trial unless defendant should consent to a correction of the mistake. Defendant filed a refusal to consent. It was held that the court properly made the order granting plaintiff a new trial final and absolute, without further notice to defendant.¹⁴³

As to the power of the court to impose terms in the cases of verdicts attacked upon other grounds than that they are excessive in amount, quantity or items included, the authorities are not in accord. The appellate courts of Kansas, emphatically deny the power.¹⁴⁴ Perhaps the weight of authority will be found to accord with the view of the Kansas court. The opinion of the supreme court of California in *Gardner v. Tatum*,¹⁴⁵ contains the following argument in favor of denying such

¹⁴² *Eaton v. Jones*, 107 Cal. 487, 40 Pac. 798; *Brown v. Doyle*, 69 Minn. 543, 72 N. W. 814.

¹⁴³ *Eaton v. Jones*, 107 Cal. 487, 40 Pac. 798; *Anderson v. Jenkins*, 99 Ga. 299, 25 S. E. 648.

¹⁴⁴ See *Atchison, Topeka & S. F. Ry. Co. v. Dwelle*, 44 Kan. 394, 24 Pac. 500; *Pierson v. Thompson*, 4 Kan. App. 173, 45 Pac. 944, holding that where a new trial is sought and awarded on the ground of error or on the part of the court, or jury, or misconduct on the part of the prevailing party, such new trial should be awarded absolutely and without condition: *Metropolitan St. Ry. Co. v. McClure*, 58 Kan. Supp. 109, 48 Pac. 566, holding that no conditions can be imposed where new trial asked on statutory grounds, and the order grants a new trial generally. And the Washington court held that where a new trial is granted plaintiff because of error of the court in ruling that his complaint did not state a cause of action, the plaintiff was entitled to the new trial unconditionally, and it was error to impose terms that his motion would be granted on condition of his filing a waiver of costs to date: *Casey v. Malidore*, 19 Wash. 279, 53 Pac. 60.

¹⁴⁵ 81 Cal. 370, 372, 22 Pac. 880.

power: "If the verdict was for an excessive amount, and it is made clear by the language of both orders that the court believed it was—and the evidence, we think, fully sustains the court in such belief—defendants were entitled to have it reduced without the imposition of any terms upon them, and without being deprived of the right to correct any errors leading to a judgment which, although supported by the evidence admitted, is nevertheless erroneous. It was not the fault of defendants that the jury found the value of plaintiff's services to be nearly double what the court thought the evidence showed it to be, and they ought not to be punished because the jury erred. The court was of opinion that no errors had been committed during the trial, but that the verdict was for eight hundred dollars in excess of what the defendants justly owed the plaintiff. Hence its order, in effect, is a penalty of eight hundred dollars against the defendants, if they fail to accept the rulings of the court, made during the trial, as just and final. Further along we shall find a practical illustration of the injustice which would result if this could be done." But in several cases, the view thus expressed has been ignored. This is true in most, and perhaps all the California cases where orders requiring the payment of costs as a condition of the order was upheld. Several cases are to be found to the effect that the condition to be performed need not be exclusively imposed as a condition upon the performance of which a new trial will be refused to the losing party; a party seeking a new trial may have it granted to him conditionally. The payment of costs is a condition frequently imposed,¹⁴⁶ and it was held that the court might condition its order upon the payment to the opposite party of a sum of money for counsel fees and expenses, and that such order would not be disturbed on appeal unless it manifestly appeared that there had been an abuse of discretion.¹⁴⁷ But the power of the court to make the payment of costs a condition to the award of a new trial on the merits is

¹⁴⁶ *Cordor v. Morse*, 57 Cal. 301; *Anglo-Nevada Assur. Corp. v. Ross*, 123 Cal. 520, 56 Pac. 335; *Garoutte v. Haley*, 104 Cal. 497, 38 Pac. 194. See *Reiber v. Ross*, 110 Pa. St. 594, 1 Atl. 422.

¹⁴⁷ *Brooks v. San Francisco etc. Ry. Co.*, 110 Cal. 173, 42 Pac. 570.

denied in Minnesota.¹⁴⁸ At any rate, no unreasonable condition can be imposed.¹⁴⁹

§ 405. Conditional orders—Effect of performance and non-performance of conditions.

The varying terms and phraseology of conditional orders have imposed upon courts more or less difficult tasks of construction, where coming up for review in connection with questions of what constituted compliance with the conditions and the effect of compliance and noncompliance. From the nature of the case, no special principles of construction can be stated, each such order being construed according to the general canons of construction, which happen to be applicable thereto.

Conditional orders usually limit the period within which the condition may be performed. It seems not to have been decided whether such an order containing no such limitation should be treated as void for want of definiteness or as taking effect as an unconditional order, or as allowing a reasonable period for performance of the condition. In the absence of authority on the question, it is suggested that such an order might be amended so as to fix a time, assuming the omission to have been an inadvertence.

But without reference to the question of performance, such orders are considered as *res adjudicata* in such sense that once made, the court has no power to materially alter their terms.

¹⁴⁸ *Park v. Electric Ther. Co.*, 75 Minn. 349, 77 N. W. 988.

¹⁴⁹ See *Crane v. Brooklyn Heights R. Co.*, 74 N. Y. Supp. 117, 68 App. Div. 202, holding that the court could not, upon defendant's motion for new trial on the ground of newly discovered evidence, in a personal damage case, require, as a condition to granting it that defendant should admit its own negligence and plaintiff's freedom from contributory negligence; *Dewey v. Lamhardt*, 37 Mo. App. 517, holding that a statute providing that a trial court may grant a new trial "on such terms as may be just" did not authorize the annexing to an order granting to the defendant a new trial, a condition that he give bond for the payment of any judgment afterward rendered against him in the cause; *Colorado (Town of) v. Liafe*, 28 Colo. 468, 65 Pac. 630, holding that the imposition of and compliance with condition that plaintiff remit part of damages found, did not give plaintiff an absolute right to judgment on the verdict.

Thus it was held that an order granting a new trial on condition that the moving party pay the costs of his adversary within a stated time was to be construed as an order denying a new trial upon noncompliance with the condition; and, that after the expiration of the time limited for complying with the condition, the court had no power to make a further order granting an unconditional new trial.¹⁵⁰ On the same principle, where an order was made granting a new trial to the defendants, on compliance by them with certain conditions, and the conditions were complied with, it was held that the court could not, on a motion to vacate this order, look beyond the question as to whether the conditions had been complied with, and undertake to investigate arrangements concerning the action made between the defendants themselves.¹⁵¹

An order granting a new trial, upon the performance of a condition, is, after the performance of the condition, an order granting a new trial absolutely,¹⁵² and upon a failure to perform the condition within the time limited, it takes effect as an order denying a new trial absolutely.¹⁵³ More fully expressed, an order denying a new trial upon the performance of a condition becomes, upon its performance, a denial absolute;¹⁵⁴ and upon nonperformance of the condition, within the time limited, it grants a new trial absolutely.¹⁵⁵

¹⁵⁰ *Browne v. Cline*, 109 Cal. 156, 41 Pac. 862. See *Garoutte v. Haley*, 104 Cal. 497, 38 Pac. 194, *Reiber v. Boas*, 110 Pa. St. 594, 1 Atl. 422, holding that after conditions are complied with the court cannot deprive the party so performing them of the benefit of the order, by its subsequent revocation. To same effect, *Baughman v. National Water Works Co.*, 58 Mo. App. 576. See, also, *Winter v. Shoudy*, 9 Wash. 52, 36 Pac. 1049. When a new trial is granted unless a remittitur be filed within ten days, which is not done, the court cannot afterward order that "the record be corrected so as to read that the remittitur may be filed within thirty days": *Crew v. McCafferty*, 124 Pa. St. 200, 10 Am. St. Rep. 578, 16 Atl. 743.

¹⁵¹ *Sherman v. Mitchell*, 46 Cal. 576.

¹⁵² *Sherman v. Mitchell*, 46 Cal. 576.

¹⁵³ *Garoutte v. Haley*, 104 Cal. 497, 38 Pac. 194; *Garoutte v. Williamson*, 108 Cal. 135, 41 Pac. 35, 413.

¹⁵⁴ *Bledsoe v. Decrow*, 132 Cal. 312, 64 Pac. 397. In this case it was held that the order denying a new trial conditionally granted a new trial upon non-performance, notwithstanding the impossibility of performance.

¹⁵⁵ *Harris v. Central of Georgia Ry. Co.*, 103 Ga. 495, 30 S. E. 425.

Performance of the condition, which will entitle a party to the benefits of an order, must be a substantial compliance, without any such reservations of right as have the effect to withhold from the other party the benefits of full performance. This is illustrated in a case where the facts were as follows: The court upon defendant's motion for new trial, ordered that in case plaintiff, within sixty days, filed written consent to a modification of judgment, defendant's motion should be denied, otherwise it should be granted. Defendant appealed from the order within the time, and plaintiff filed consent to the modification, but annexed a condition that there should be no further proceedings in the case. It was held that plaintiff had no power to add conditions to his consent, and such conditional consent did not constitute a compliance with the order, and that therefore, defendant's right to a new trial became absolute.¹⁵⁶ On the other hand, a substantial compliance in good faith is all that can be required; and where a new trial was granted to defendant on payment of the plaintiff's costs, within twenty days, and there was an error in computing the costs, it was held that the defendant might, within the twenty days, tender the real sum due as costs, and if it was refused, to move to retax the costs after the twenty days expired and the court might retax them and refuse to let an execution issue.¹⁵⁷

Conditions thus imposed may be waived as in other cases. And it was held that a condition upon which a new trial was granted was waived by proceeding with a retrial without objection.¹⁵⁸

§ 406. Rules of evidence governing when hearing upon affidavits.

The issues to be tried at the hearing of the motion, though often of great importance, are usually tried in a summary, and sometimes in an imperfect and unsatisfactory, manner. This comment is not in point, of course, where the inquiry is con-

¹⁵⁶ *Bonelli v. Jones* (Nev.), 65 Pac. 374. See, also, *Richardson v. Birmingham Cotton Mfg. Co.*, 116 Ala. 381, 22 South. 478, where plaintiff refused to make good his offer by refusing to make it effective by the filing of a remittitur.

¹⁵⁷ *Higuerra v. Bernal*, 46 Cal. 580.

¹⁵⁸ *Central Land Co. of B. v. Obenchain*, 92 Va. 136, 22 S. E. 876.

finer to the record already made up at the trial, and before the court at the hearing, as it must be where the motion is made on certain grounds, nor is it applicable to the record where it is used as part of the matter to be examined when other grounds are urged. But when *ex parte* affidavits are the sole means of reaching a decision on a vital issue of fact, experience has taught that a false conclusion is almost as likely to result as a true one. Aside, however, from the form in which the evidence is presented, the issues of fact arising on the motion should be tried as such issues are ordinarily tried and the general rules of evidence are applicable on questions of admissibility. The limitations of this work forbid an elaborate discussion of the law of evidence, but the results of some of the decisions specially applicable will be noted.

The credibility of witnesses is entirely for the trial court to pass upon. Owing to the form in which the evidence is usually received the court is deprived of the benefit of the presence of the witness and of the test of a cross-examination. But the court may compare the evidence with that introduced on the trial in so far as that enables it to determine its truth or falsity.¹⁵⁹ In cases of conflict between statements in affidavits in chief and counter-affidavits, or between the latter and reply affidavits, the decision of the trial court will rarely be disturbed on appeal.¹⁶⁰

¹⁵⁹ *People v. Merkle*, 89 Cal. 82, 26 Pac. 642. See, also, *People v. Wilson*, 119 Cal. 384, 51 Pac. 639, holding that where there is legal evidence to support a verdict of guilty, the jury's recommendation of "extreme mercy of the court" negatives the claim of "passion and prejudice" in rendering the verdict. In the first case here cited the court said: "But undoubtedly it was the duty of the court below, in passing upon appellant's motion, to give most careful consideration to these affidavits, and if, when weighed in connection with the evidence given upon the trial, there would be in the mind of the judge a reasonable doubt as to the justice of the verdict, a new trial should have been granted." In *Cavannah v. State*, 56 Miss. 310, the court said: "Each case must be determined by its circumstances, and the new trial granted or refused, according to the view taken of the whole evidence, in connection with the evidence of the acquitted party, now made competent as a witness for the other." In this second case the court also considered the recommendation of the jury "to the extreme mercy of the court."

¹⁶⁰ *People v. Biles*, 2 Idaho, 114, 6 Pac. 120; *Crawford v. Harris* (Cal.), 45 Pac. 819.

When misconduct of the jury is the ground relied upon any improper influence brought to bear upon the jury or upon particular jurors, either from within or from without, is admissible to prove it, the presumption being that such influence had the effect which it was intended or calculated to have. The theory upon which it is classed as misconduct of the jury is that it was the fault of the jury that they permitted such influence to reach them.¹⁶¹ The court will admit evidence of misconduct, including improper influences and also evidence to contradict that offered to prove it; but as to whether such misconduct affected the verdict is a question for the court, whose exclusive province it is to determine all disputed questions of fact.¹⁶²

In case of error in the admission or exclusion of evidence at the hearing, the proper practice is to appeal from the order on a bill of exceptions and the appellate court will not only review the order on its merits, but the particular rulings excepted to. This was done in *People v. Murray*,¹⁶³ where the court affirmed the judgment, but set aside the order and directed a rehearing of the motion by the lower court.

Circumstantial evidence should be given the same consideration as in the trial of issues of fact generally.¹⁶⁴ In one case¹⁶⁵ a charge that the verdict was reached by a resort to the

¹⁶¹ See *People v. Murray*, 85 Cal. 350, 24 Pac. 666; *People v. Stokes*, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207; ante, § 164.

¹⁶² See *State v. McDaniel*, 39 Or. 161, 65 Pac. 520; *Outcalt v. Johnson*, 9 Colo. App. 519, 49 Pac. 1058; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *State v. Webb*, 20 Wash. 500, 55 Pac. 935; *State v. Hunter*, 18 Wash. 670, 52 Pac. 247; *State v. Gay*, 18 Mont. 51, 44 Pac. 411; *Black v. Territory*, 3 Wyo. 313, 22 Pac. 1090. For a case where affidavit of juror was held to overcome showing of bias, see *McDuffie v. State*, 90 Ga. 786, 17 S. E. 105.

¹⁶³ 85 Cal. 82, 24 Pac. 648. The order for a rehearing in such case was distinctly declared to be proper practice in *State v. Stiefel*, 106 Mo. 129, 17 S. W. 227.

¹⁶⁴ *Martin v. Morelock*, 32 Ill. 488; *Nelson v. State* (Tex. Cr. App.), 58 S. W. 107.

¹⁶⁵ *Southern Ry. Co. v. Williams*, 113 Ala. 620, 21 South, 328. In this case one of the papers returned by the jury showed figures representing twelve amounts added together and divided by twelve, the quotient exactly corresponding with the verdict. It was held that

determination of chance, that is it was a "quotient" verdict, was held to be satisfactorily made out by circumstantial evidence alone; in another case¹⁶⁶ it was held that a prior agreement to return such verdict should have been proven, the circumstantial evidence not being so strong as in the first case mentioned.

As to what constitutes misconduct warranting a new trial, it is in a general sense a question of law; nevertheless, so much is conceded to the judgment and discretion of the trial court that no general proposition can be stated, or announced as an unqualified rule of law unaffected by such discretionary power. But when a party moving for a new trial establishes facts, which must be upon general principles, applicable to the case, held to be misconduct, the burden then shifts to the party in whose favor the verdict was rendered to offset the proof of misconduct.¹⁶⁷ Further than this, according to the decisions in

it should be presumed that the jurors agreed beforehand that such quotient should be their verdict, and it should be set aside and a new trial granted.

¹⁶⁶ *Jobe's Admr. v. Weaver*, 77 Mo. App. 665. In this case it was held that the mere production of a piece of paper from the juryroom containing twelve items, appearing to have been added together and divided by twelve, also showing a division by twelve, and a quotient nearly corresponding with the verdict, did not alone warrant the granting of a new trial; that a party must show, in order to entitle him to a new trial, that there was an agreement that such calculation should be made, and that such quotient should stand for their verdict. See on same subject, *John Spry Lumber Co. v. Daggett*, 80 Ill. App. 394.

¹⁶⁷ *Saltzman v. Sunset Tel. etc. Co.*, 125 Cal. 501, 58 Pac. 169; *United States v. Spencer*, 8 N. Mex. 667, 47 Pac. 715; *States v. Olds*, 106 Iowa, 110, 76 N. W. 644. See *State v. Cross*, 95 Iowa, 629, 64 N. W. 614, holding statement by one juror to others while deliberating on a verdict that the defendant had been convicted of larceny before, did not constitute misconduct warranting a new trial without a further showing; *Ray v. State*, 35 Tex. Cr. App. 354, 33 S. W. 869, to same effect; *Lucas v. State*, 27 Tex. App. 322, 11 S. W. 443, similar statements and showing that one juror was probably influenced, new trial ordered; *Washburn v. State*, 31 Tex. Cr. Rep. 352, 20 S. W. 715, juror saw so much of difficulty as to disqualify him, new trial ordered notwithstanding his affidavit that he passed on the case impartially. Last case distinguished in *Shaw v. State*, 32 Tex. Cr. App. 155, 22 S. W. 588.

many well-considered cases, he cannot go by the introduction of evidence. In *People v. Conkling*,¹⁶⁸ it was said: "For when misconduct of jurors is shown, it is presumed to be injurious to defendant, unless the contrary appears." And similar expressions are found in other cases. But they are calculated to mislead without qualification or explanation. It is true that the contrary may be made to appear to the court, but it must be made to appear from its own knowledge of the case or be disclosed by the record on the trial. If the record for instance shows that the verdict is supported by evidence so conclusive that the jury could not, in view of their oaths as such, have reached a different conclusion, the court may be warranted in saying that the party was not prejudiced by the misconduct. Sometimes the misleading impression is conveyed by confounding the evidence bearing on the ultimate fact of misconduct with a consideration of the effect of such misconduct. For instance, where a jury has separated or been permitted to separate by some inadvertence, evidence is clearly admissible to show that during such separation they conversed with no one. Now, such evidence is not really on the question of the effect of misconduct, but on the question of whether there has been misconduct; and yet the courts have often spoken of it as evidence admitted, and properly admissible, to prove that the losing party was not prejudiced by the misconduct of the jury.

Misconduct being shown, the question of a prejudicial effect, or result of it, is for the court, to be determined as one of mixed fact and law, having reference to the whole case. The question has almost invariably arisen where it was sought after proof of improper influences brought to bear on jurors, or of evidence being received by them out of court, to prove by the jurors themselves that they were not, in fact, influenced by the cause shown.

¹⁶⁸ 111 Cal. 616, 628, 44 Pac. 314. In *People v. Azoff*, 105 Cal. 632, 635, 39 Pac. 59, the court in speaking of cases in which occurred unguarded expressions such as were used in *People v. Conkling*, the court said: "In permitting the district attorney to call the jurors to show that they had read nothing which influenced their verdict, the court followed intimations found in *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161, and *People v. Murray*, 85 Cal. 350, 24 Pac. 666. In the late case of *People v. Stokes*, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207, this court said that upon that point those cases do not express the law."

The true rule on the subject is thus stated in a Massachusetts case:¹⁶⁹ "But, where evidence has been introduced tending to show that without authority of law, but without any fault of either party or his agent, a paper was communicated to the jury which might have influenced their minds, the testimony of the jurors is admissible to disprove that the paper was communicated to them, though not to show whether it did or did not influence their deliberations and decision. A jurymen may testify to any facts bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind." The court was here speaking of disinterested agencies, such, for instance, as newspaper articles. The same rule is, for still better reasons, enforced in cases where the successful party is shown to have used means calculated to improperly influence the jury.¹⁷⁰

The rule of the above case may be now considered as a settled principle in California. There are intimations of a contrary view in one or two cases,¹⁷¹ but later well-considered cases may be considered conclusive on the subject.¹⁷²

There is in criminal cases involving severe punishment in case of conviction, a strong temptation to make a showing of the disqualification of jurors who have tried the case, by establishing statements inconsistent with the testimony given on voir dire of the absence of an opinion touching the guilt or innocence of the accused. For this reason courts require clear and abundant proof of very positive expressions of opinion adverse to defendants before granting new trials for such cause. A hypothetical opinion expressed by a juror prior to a trial, that if what he had read about the case was true accused ought to be convicted on general principles, was held not alone suffi-

¹⁶⁹ *Woodward v. Leavitt*, 107 Mass. 453, 9 Am. Rep. 49. To same effect, *Harrington v. Worcester etc. Ry. Co.*, 157 Mass. 579, 32 N. E. 955.

¹⁷⁰ See ante, §§ 82-88.

¹⁷¹ *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Murray*, 85 Cal. 350, 24 Pac. 666.

¹⁷² *People v. Stokes*, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207; *People v. Azoff*, 103 Cal. 632, 39 Pac. 59.

cient to warrant a new trial.¹⁷³ Expressions of hostility after hearing the evidence cannot be made available as evidence to prove bias at the time a juror was sworn to try the case,¹⁷⁴ and it will usually require the affidavit of more than one disinterested witness to overcome the sworn testimony of a juror on his voir dire examination to the effect that he is free from bias, especially if the affidavit of the juror whose impartiality is thus assailed be produced and contradicts the impeaching evidence. In *Territory v. Burgess*,¹⁷⁵ the defendant, to sustain his motion for a new trial, filed the affidavits of two persons, one of whom swore that one juror had expressed an opinion as to the guilt of the accused before the trial, and the other that another juror had also expressed such an opinion prior to his sitting on the jury, and both of the said jurors on their voir dire had stated that they had never expressed or formed an opinion concerning defendant's guilt or innocence. The two jurors were thereupon brought into court, sworn, and subjected to examination. They denied ever having expressed the opinion set forth in said affidavits. The motion for a new trial was denied, and it was held that the denials of the jurors rebutted the statements of the persons making the affidavits, and that there was no error in denying a new trial.

¹⁷³ *State v. Gile*, 8 Wash. 12, 35 Pac. 417.

¹⁷⁴ *State v. Anderson*, 14 Mont. 541, 37 Pac. 1.

¹⁷⁵ 8 Mont. 57, 19 Pac. 558. In this case the court per De Wolfe J., said: "In this connection it is not improper to say that the temptation is strong on the part of a defendant who has been convicted in a criminal case and particularly on the grave charge of murder, to try and obtain a new trial on the two grounds alleged in this case—of misconduct of the jury, and the incompetency of a juror by reason of having expressed an opinion in the case. These, when the facts clearly establish the misconduct in the one case, or the expression of an opinion by a juror in the other, are plainly sufficient grounds for granting a new trial. But, in view of the temptation on the part of the defendant, and also on the part of his friends, to obtain a rehearing in the case of conviction, and in view, also, of the facility with which affidavits for that purpose can be obtained, courts should closely scan affidavits procured for that end; and, unless convinced of their correctness, should not be influenced by them in granting a new trial, and this, we think, has been the action of the district court in the present case." And in *State v. Davis* (Idaho), 53 Pac. 678, it was held that one or two ex parte affidavits are not

§ 407. Limiting consideration of counter-affidavits, on question of newly discovered evidence.

There have appeared to the courts of some of the states good reasons for limiting the admissibility of counter-affidavits to the question of diligence and the like and denying them consideration in so far as it was sought therein to controvert the facts set forth in the affidavits of the movant as newly discovered.¹⁷⁶ In other states, in addition to controverting the showing in such matters as diligence, they are allowed for the purpose of attacking the credibility of the new witnesses, but rejected for further purposes.¹⁷⁷ In California, though the question seems not to have been seriously litigated in any case, yet the case of *Shafer v. Willis*¹⁷⁸ should be considered authority to the effect that, while counter-affidavits are admissible on every other matter offered for the consideration of the court, in affidavits in chief alleging newly discovered evidence, they are not admissible in so far as they seek to controvert the truth of the alleged new matter itself. The decision was concurred in by the three justices composing a department, but the view just stated was maintained in a concurring opinion which contained a very emphatic dissent from some of the language contained in the opinion. This concurring opinion was by two of the three justices; so that the decision of the court on this point is really contained in the concurring opinion, which is in part as follows: "Section 657 of the Code of Civil Procedure provides that a new trial may [must] be granted 'for any of the following causes materially affecting the substantial rights of such party . . . 4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.' Now, if a showing is made which satisfies the statute, the party is

sufficient to overcome the statement of the juror on his voir dire examination where such juror is shown to have a good reputation for truth and veracity. To same effect: *State v. Hall*, 24 Wash. 255, 64 Pac. 153. Conflicting affidavits as to disqualification of juror—new trial denied: *Wilson v. Seaman*, 15 S. Dak. 103, 87 N. W. 577.

¹⁷⁶ See *Nelson v. Life Assur. Soc.*, 73 Ill. App. 133.

¹⁷⁷ See *Greenleaf v. Grounder*, 84 Me. 50, 24 Atl. 461; *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046.

¹⁷⁸ 124 Cal. 36, 56 Pac. 635.

entitled to a new trial in court according to the law regulating such trials. The court cannot, in lieu of such new trial, determine the issue of fact on affidavits and find that, though such evidence material under the rigid rules especially applied to these motions, and which, if true, would probably require a different judgment, can be produced, nevertheless, the opposing party can refute the new testimony by other evidence, also new. This would be to retry the issue on affidavits, and to deny the trial according to established procedure, such as the statutes provide the moving party who makes such a case shall have. . . . On many points, no doubt, the affidavits of the moving party may properly be overcome by counter-affidavits. As to the use of due diligence, or that the evidence is newly discovered, or can be had, no doubt affidavits of the proposed witnesses might be read to show that they would not testify as represented, in short, any pertinent matter may then be tried except the issue of fact to which the newly discovered evidence is addressed. That issue cannot be then tried, although the court may examine the proposed testimony and compare it with the case already made upon the trial to determine its relevancy and importance, and if it determines that the evidence, if true would most probably not change the result, the motion should be denied." In a prior case the court, in speaking of the use which might be made of counter-affidavits said: "Counter-affidavits may be used on such motion to show that due diligence has not been used." 179

§ 408. Knowledge of court—How made available on motion.

The knowledge of the court of matters occurring and properly coming before it during the trial may be, and usually is resorted to more or less at the hearing. Just how far and to what extent this knowledge can be made available, and how far it is conclusive as against evidence to the contrary has seldom been made the subject of serious and extensive discussion in the higher courts. In one case, as previously shown, the mere recollection and belief of the court was ignored, and the affidavits of witnesses accepted in preference to it on ap-

179 *People v. Cesena*, 90 Cal. 381, 383, 27 Pac. 300. See, also, *State v. Gay*, 18 Mont. 51, 44 Pac. 411.

peal,¹⁸⁰ and as will elsewhere be shown,¹⁸¹ the decision of the court as to whether a party excepted to a ruling may be overcome by a proper proceeding. In order that the knowledge of the court may be made available at the hearing, it is not necessary that the judge be sworn; for instance, to show that he admonished the bailiff not to allow the jury to read papers relating to the trial. Such fact, if material may be stated in the bill or statement without proof.¹⁸² This rule is of special importance where the motion is made on the minutes in all cases when the presence and services of a stenographer have been dispensed with. In *Malcolmson v. Harris*,¹⁸³ the court said: "That a judge may and must consider on a motion for a new trial, made in advance of a statement, all evidence material to the grounds and specifications of the notice, whether reported or not, is something which the legislature may well have deemed too obvious to call for express enactment; and if such evidence is to be considered, it must go into the statement." And a writ of mandate was awarded compelling the trial judge to settle the statement according to his recollection of the evidence and proceedings.

§ 409. Disqualification of jurors as witnesses at hearing.

The disqualification of jurors as witnesses on motion for new trial to impeach or in any way discredit their verdict is a common-law principle founded upon the most important considerations of public policy. The rule as thus settled is recognized and enforced in the courts of every state, with perhaps only one exception,¹⁸⁴ with a few qualifications, sometimes made by statute,

¹⁸⁰ See ante, § 43.

¹⁸¹ See post, § 458.

¹⁸² *People v. Azoff*, 105 Cal. 632, 636, 39 Pac. 59. In this case the court said: "There was no error in refusing to permit the trial judge to be sworn, on the hearing of the motion for a new trial, to show that he had admonished the bailiff not to allow the jury to read papers relating to the case. On this motion such admonition would cut no figure, and, if the fact existed, it was a matter within the knowledge of the court, and might have been stated as a fact in a bill of exceptions without proof."

¹⁸³ 90 Cal. 262, 265, 27 Pac. 206.

¹⁸⁴ Code of Criminal Procedure of Texas, article 817, subdivision 8, makes the voluntary affidavits of jurors competent to prove misconduct in felony cases: *Keith v. State* (Tex. Cr. App.), 56 S. W.

and in other instances in the absence of any statutory relaxation.¹⁸⁵ In California and in several other states an exception is made in the case of "chance" verdicts. The presence of this exception in the statute¹⁸⁶ is held to be exclusive of all others. The general rule was established at a very early date in that state. In the case of *People v. Baker*,¹⁸⁷ Bennett, J., said: "We consider it a settled rule, founded upon considerations of necessary policy, that the testimony of a jurymen cannot be received to defeat his own verdict." By an amend-

628. Otherwise the general rule prevails as in other states: See *Wood v. Gulf etc. Ry. Co.* (Tex. Civ. App.), 40 S. W. 24. If it be misconduct in legal sense for jurors to ignore and disregard the charge of the court in considering the evidence, it cannot, at any rate, be shown by the affidavits of jurors: *Dewey v. State* (Tex. Cr. App.), 53 S. W. 886. Affidavits as to statements of jurors out of court to the other jurors are admissible in Texas in felony cases: *Mason v. State* (Tex. App.), 16 S. W. 766. But probably because jurors in Texas may impeach their verdict for misconduct in such cases, by their own affidavits.

185 See *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20, 26 S. W. 712; *Wray v. Carpenter* (Colo.), 25 Am. St. Rep. 265, 27 Pac. 248; *Territory v. King*, 6 Dak. 131, 50 N. W. 623; *Cornwall v. State*, 91 Ga. 277, 18 S. E. 154; *Griffith v. Montandon*, 4 Idaho, 377, 39 Pac. 548; *State v. Rigley* (Idaho), 62 Pac. 679; *State v. Murphy* (Idaho), 61 Pac. 462; *Purcell v. Tibbles*, 101 Iowa, 24, 69 N. W. 1120; *Christ v. Webster City*, 105 Iowa, 119, 74 N. W. 743; *State v. Corcoran*, 50 La. 453, 23 South. 511; *Commonwealth v. White*, 147 Mass. 76, 16 N. E. 707; *People v. Martin*, 116 Mich. 446, 74 N. W. 653; *State v. Palmer*, 161 Mo. 152, 61 S. W. 651; *State v. Gage*, 52 Mo. App. 464; *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273; *Savary v. State*, 62 Neb. 11, 87 N. W. 34; *Gran v. Houston*, 45 Neb. 813, 64 N. W. 245; *State v. Crutchley*, 19 Nev. 368, 12 Pac. 113; *State v. Andre*, 14 S. Dak. 215, 84 N. W. 783; *State v. Bennett*, 40 S. C. 308, 18 S. E. 886; *Scraggs v. State*, 90 Tenn. 81, 15 S. W. 1074; *Hannum v. State*, 90 Tenn. 647, 18 S. W. 269; *Homer v. Inter Mountain Abstract Co.*, 9 Utah, 193, 33 Pac. 700; *People v. Ritchie*, 12 Utah, 180, 42 Pac. 209; *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. 21; *Marvin v. Yates*, 26 Wash. 50, 66 Pac. 131; *Bunce v. McMahon*, 6 Wyo. 24, 42 Pac. 23. Though the affidavits of jurors may not be received to establish misconduct of the jury, yet they may be received to show misconduct of others: *Heller v. People*, 22 Colo. Supp. 11, 43 Pac. 124.

186 See Cal. Code Civ. Proc., § 657, subd. 2.

187 1 Cal. 403.

ment to the Practice Act in 1862 it was provided that verdicts found by a "resort to the determination of chance" might be impeached by the affidavits of jurors. The exception has remained in the law ever since, substantially as at first enacted. In *People v. Wyman*,¹⁸⁸ the effect of this exception to exclude all other exceptions was first declared, the court saying: "By declaring in what cases verdicts may be impeached by the affidavits of jurors the legislature, upon the maxim, 'Expressio unius, exclusio alterius est,' has declared that verdicts of a different class shall not be so impeached." This construction was adopted in subsequent cases.¹⁸⁹ In all the states except Texas (where by statute the affidavits of jurors both, to prove and disprove, misconduct are freely admitted), the general rule is recognized. But the courts of many of them allow exceptions, which vary greatly, those of scarcely any two states agreeing as to what exceptions shall be made.¹⁹⁰ In discussing the policy of the general rule Temple, J., delivering the opinion

¹⁸⁸ 15 Cal. 75.

¹⁸⁹ See *Boyce v. California Stage Co.*, 25 Cal. 460; *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549; *People v. Pratt*, 78 Cal. 345, 20 Pac. 731; *People v. Deegan*, 88 Cal. 602, 26 Pac. 500; *People v. Murray*, 94 Cal. 212, 28 Am. St. Rep. 113, 29 Pac. 494; *People v. Azoff*, 105 Cal. 632, 635, 39 Pac. 59; *People v. Soap*, 127 Cal. 408, 59 Pac. 771. The constitutional amendment allowing nine jurors to return a verdict in a civil case does not alter the rule forbidding verdicts being impeached by testimony of jurors: *Saltzman v. Sunset T. & T. Co.*, 125 Cal. 501, 58 Pac. 169.

¹⁹⁰ The broadest exception is allowed in the federal courts, and stops little short of an abrogation of the general rule: See *Maddox v. United States*, 146 U. S. 140, 13 Sup. Ct. Rep. 50; *Ewer's Admr. v. National Imp. Co. (C. C.)*, 63 Fed. 562; *Muse v. Montana Ore Purchasing Co. (U. S. C. C.)*, 105 Fed. 337. The same may be said of Wisconsin. See *Peppercorn v. Black River Falls (City of)*, 89 Wis. 38, 46 Am. St. Rep. 818, 61 N. W. 79, holding affidavits of jurors admissible to prove unauthorized view of premises; *Hempton v. State*, 111 Wis. 127, 86 N. W. 596, holding that the conduct of jurors while outside of the courtroom, impeaching their verdict, may be shown by their own affidavits. To same effect, is *Rush v. St. Paul City St. Ry. Co.*, 70 Minn. 5, 72 N. W. 733. It is held in Nebraska that when the misconduct to prove which affidavits of jurors are offered does not inhere in verdict, as when it relates to reading newspapers, calling witnesses before them out of court etc. Such affidavits may be received: *Harris v. State*, 24 Neb. 803, 40 N. W. 317.

in *People v. Azoff*,¹⁹¹ said: "Other courts do not agree upon the exceptions which should be made to the rule, and, if the question were an open one, I think the rule established here is the best. Hardships will arise under either rule; but while it will occasionally appear that justice will miscarry unless such evidence can be regarded, the contrary rule opens the door wide to corrupt practices. The jury will be subjected to influences, after they have discharged their duty as jurors, to induce them to repent of their decision and endeavor to revoke it. They would then be liable to be tampered with. Indeed, it would be difficult to place a limit to the corruption such a practice might engender." It is held in Illinois that the rule has no application where the testimony of fellow-jurors is offered to prove that a juror swore untruthfully on his voir dire, touching his qualifications, and that he was really a prejudiced juror.¹⁹² The same question appears not to have been passed upon elsewhere. The only doubtful point in such a decision is as to whether such evidence impeaches the verdict or tends merely to establish an irregularity. That ground for new trial has been treated in this work as an irregularity rather than as misconduct of the jury.¹⁹³ Still it must be conceded that to show that the verdict was not that of impartial jurors, attacks or impeaches it, just as effectually as if misconduct after the jurors were sworn were charged.

The general rule that evidence as to the effect of misconduct, shown to have occurred, upon the verdict, being on a question for the exclusive determination of the court, and therefore inadmissible, has been already adverted to. The rule that the affidavits of jurors sought to be used for the purpose of showing the absence of prejudicial effect are inadmissible, holds good even in jurisdictions where there are exceptions to the

¹⁹¹ 105 Cal. 632, 635, 39 Pac. 59.

¹⁹² *West Chicago St. Ry. Co. v. Huhnke*, 82 Ill. App. 404. It was also held in *Hyman v. Eames*, 41 Fed. 676, that where the question on motion for new trial is whether a juror declared himself in favor of one of the parties before the trial, and there was evidence to show that he did so, the affidavits of the other jurors showing that he made similar declarations in the juryroom were admissible.

¹⁹³ See ante, c. 5.

rule which excludes their evidence to impeach their verdicts,¹⁹⁴ as well as in Texas where their testimony is admitted to show misconduct.¹⁹⁵

Within the reason of the rule excluding the testimony of jurors to impeach their verdicts comes evidence of statements of jurors after return of the verdict having the same effect, or tendency, and it is likewise excluded.¹⁹⁶ Such evidence, in

¹⁹⁴ *Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. Rep. 50; *Morse v. Montana Ore Pur. Co.* (U. S. C. C.), 105 Fed. 337.

¹⁹⁵ See *Favro v. State* (Tex. Cr. App.), 59 S. W. 885.

¹⁹⁶ *Siemsen v. Oakland etc. Ry.* 134 Cal. 494, 66 Pac. 672; *People v. Azoff*, 105 Cal. 632, 39 Pac. 59; *Territory v. Taylor*, 1 Dak. Ter. 484; *Barker v. Livingston County Nat. Bank*, 30 Ill. App. 591; *Smith v. Smith*, 169 Ill. 623, 48 N. E. 306; *Sharpe v. Williams*, 41 Kan. 56, 20 Pac. 497; *Cain Bros. Co. v. Wallace*, 46 Kan. 138, 26 Pac. 445; *State v. Rush*, 95 Mo. 199, 8 S. W. 221; *Praffer v. Miller*, 69 Mo. App. 501; *State v. Jackson*, 9 Mont. 508, 24 Pac. 213; *State v. Anderson*, 14 Mont. 541, 37 Pac. 1; *Johnston v. Allen*, 100 N. C. 131, 5 S. E. 666; *Palmer v. State*, 65 N. H. 221, 19 Atl. 1003; *Luft v. Lingane*, 17 R. I. 420, 22 Atl. 942. In *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, the court said: "It is a dangerous practice to allow verdicts to be set aside upon ex parte affidavits as to what jurors are claimed to have said before they were summoned to act as jurymen. The parties making such affidavits submit to no cross-examination, and the correctness of their statement is subject to no test whatever." To same effect *State v. Peterson*, 38 Cal. 204. In *State v. Anderson*, supra, the defendant presented affidavits to the effect that one of the jurors had said: "If that man gets a new trial, and is turned loose, he shall never get out of this town alive. I will shoot him down with my own hand, like a dog." Of this the supreme court in affirming the order denying a new trial, said: "Rich, in his affidavit used on the hearing, does not deny that he made use of these expressions, but he says that they were all made since the verdict was rendered, and that his opinion so expressed was formed by hearing the evidence adduced at the trial, and that when he was impaneled as a juror he had no bias or prejudice whatever. These expressions are urged as showing prejudice by the juror Rich. 'Prejudice' means 'prejudgment'; 'judgment beforehand.' Rich's statements certainly show his opinion or judgement as to defendant's guilt. His verdict also showed that, as it ought. But the expressions do not show his prejudgment or prejudice. The showing is uncontradicted that this was the juror's after-judgment—his opinion after the trial—and formed upon hearing the evidence. His opinion of the guilt of the defendant, after the trial, and after the verdict of guilty cannot be taken as

addition to the rule of public policy, against its admission is subject to the further objection that it is hearsay. A resort to a determination by chance being a species of misconduct, jurors are not permitted to give evidence of the same, in the absence of a statutory exception on the subject.¹⁹⁷ The preponderance of authority is to the effect that what is known as a "quotient" verdict is a chance verdict;¹⁹⁸ and in the absence of such a statutory exception, these are within the rule of exclusion.

proof that he held such opinion before the trial, in the absence of any showing that he did hold such opinion, and in the presence of the express showing that he did not hold any such opinion before the trial. This ground for new trial was also properly overruled by the court." So in *Territory v. Burgess*, 8 Mont. 57, 19 Pac. 558, Justice De Wolfe, delivering the opinion, said: "In this connection, it is not improper to say that the temptation is strong on the part of a defendant who has been convicted in a criminal case, and particularly on the grave charge of murder, to try and obtain a new trial on the two grounds alleged in this case—of misconduct of the jury, and incompetency of a juror by reason of having expressed an opinion in the case. These, when the facts clearly establish the misconduct in the one case, or the expression of an opinion by a juror in the other, are plainly sufficient grounds for granting a new trial. But in view of the temptation on the part of the defendant, and also on the part of his friends, to obtain a rehearing in the case of conviction, and in view, also, of the facility with which affidavits for this purpose can be obtained, courts should closely scan affidavits procured for that end, and, unless convinced of their correctness, should not be influenced by them in granting a new trial; and this, we think, has been the action of the district court in the present case."

¹⁹⁷ *Moses v. Central Park etc. R. R. Co.* (N. Y. Com. Pl.), 23 N. Y. Supp. 23; *Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 488; *Kunkel v. Hughes* (Com. Pl.), 6 Pa. Dist. R. 356; *Clark v. Manchester*, 64 N. H. 471, 13 Atl. 867; *Alexander v. Humber*, 86 Ky. 565, 6 S. W. 453.

¹⁹⁸ *Dixon v. Pluna*, 98 Cal. 384, 35 Am. St. Rep. 180, 33 Pac. 268, overruling *Turner v. Tuolumne Water Co.*, 25 Cal. 397; *Gordan v. Trevathan*, 13 Mont. 387, 40 Am. St. Rep. 452, 34 Pac. 185; *Long v. Collins*, 12 S. Dak. 621, 82 N. W. 95, overruling *Ulrick v. Trust Co.*, 2 S. Dak. 285, 49 N. W. 1054. Such affidavits receivable under the Compiled Laws of South Dakota, section 5088. To same effect, *Flood v. McClure*, 3 Idaho, 587, 32 Pac. 254; *Pawnee Ditch & Improvement Co. v. Adams*, 1 Colo. App. 250, 28 Pac. 662; *East Tennessee etc. R. Co. v. Winters*, 85 Tenn. 240, 1 S. W. 790; *Johnson v. Husband*, 22 Kan. 277; *Lee v. Chute*, 10 Nev. 149; *Chicago etc. R. R. Co. v. McDaniel*, 134 Ind. 166, 32 N. E. 728, 38 N. E. 769; *Goodman v. Cody*,

As to whether jurors should be permitted to give evidence to the effect that the verdict as returned was not the verdict agreed upon or to which they assented there is a divergence of authority. In some cases distinctions have been drawn between evidence directed to matters inhering in the verdict, that is alleged to be

1 Wash. Ter. 329, 34 Am. Rep. 808, and note; *Dorr v. Fenno*, 12 Pick, 521; *Pekin (City of) v. Winkel*, 77 Ill. 56; *Hamilton v. Railroad Co.*, 36 Iowa, 51. Preliminary to deciding that a quotient verdict is a chance verdict, and that the juror's affidavit was admissible to prove it, in *Dixon v. Plums*, supra, Garoutte, J., delivering the opinion said: "Appellant moved for a new trial upon the ground of misconduct of the jury in this, that they arrived at their verdict by a resort to the determination of chance. The code expressly provides that such misconduct may be shown by the affidavits of jurors (Code Civ. Proc., § 657), and in support of the motion appellant presented the affidavit of one Koster, a juror, wherein he stated: 'That upon retiring to the juryroom the twelve jurors first agreed by a vote that the average sense of the jurors should control in arriving at what the verdict should be, and then the twelve jurors agreed to be controlled by their vote, and voted that the said average sense of the jurors should be arrived at in the manner following, namely, by each individual juror writing on a piece of paper what he would fix the verdict at, and that the sums so written should then be added together, and the aggregate divided by twelve, and that the amount resulting should be taken as the average sense of the jurors, and be put in the verdict accordingly, and thereupon the said plan was carried out,' etc. Courts have not been astute in perceiving sufficient error to set aside verdicts upon the ground here relied upon, and evidence sustaining the verdict has been generally favored; but upon this motion no opposing affidavits were offered, and the merits of the contention rest alone upon the sufficiency of the statement of facts above recited. Reduced to its lowest terms, the affidavit plainly discloses that the verdict was the result of a previous agreement, and was arrived at upon the basis that the amount of the verdict should be the quotient resulting from a division wherein twelve was the divisor, and the sum of the various amounts at which each juror would fix the verdict, the dividend. The calculation was made in pursuance of a prior agreement that the result should be the verdict, and that result was adopted as the verdict, not upon further consideration of the jury and upon the determination that such amount formed a just and proper verdict, but it was adopted in pursuance of the prior 'agreement.' The decisions of our courts clearly indicate that they do not countenance such procedure, and the verdict must be set aside if the affidavits of jurors are entitled to be received as evidence to prove the agreement and the consummation thereof, and that matter is dependent upon the solution of the question: Is the verdict a

mistakes and misunderstandings by which they were led to agree to the verdict as returned, and evidence offered to prove that the verdict which was returned was not that agreed upon, holding the evidence admissible for the latter, but inadmissible for the former purpose.¹⁹⁹ But the same objections founded upon considerations of public policy may be urged against his impeachment of his verdict in the one case as in the other. It is the privilege of the parties to have the jury polled upon the return of a verdict in open court; and failing to do this they should not be subsequently heard to object that it was not the same as that agreed upon. There are stronger reasons for allowing a mistake to be shown in the case of a sealed verdict; but the same reasons of public policy stated in the opinion in *People v. Azoff*, previously quoted, could be urged in that case. Nevertheless, such reasons should not be permitted to stand in the way in a clear case where to refuse relief would be a complete miscarriage of justice. The affidavits of jurors were received in an Illinois case on motion for new trial in such a case, it being alleged and shown by the affidavits of jurors that the verdict returned was not the one agreed upon.²⁰⁰ In Arizona it was held that the rule should not be relaxed in such case.²⁰¹ It might be worth while under such circumstances to resort to the provisions of statutes such as section 473 of the California Code of Civil Procedure for the correction

chance verdict, within the meaning of the statute? Counsel for respondent, with good reason, rely upon *Turner v. Tuolumne County Water Co.*, 25 Cal. 397, to support his contention in this regard. It is there decided that a verdict arrived at in the manner hereinbefore set forth is not a chance verdict, and therefore cannot be attacked by the affidavits of jurors. But after mature consideration, we think, the principle there declared erroneous, and that the establishment of a contrary rule, in this court especially, where the rights of property, reputation, and life are all taken into the jury-room and there passed upon by jurors, will result in a purer and more satisfactory administration of justice."

¹⁹⁹ See *Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co.* (C. C.), 71 Fed. 826; *Kennedy v. Ball & Wood Co.*, 91 Hun 197, 36 N. Y. Supp. 325; *Smalley v. Morris*, 157 Pa. St. 349, 27 Atl. 734.

²⁰⁰ *Schwamb Lumber Co. v. Schaar*, 94 Ill. App. 544.

²⁰¹ See, also, *Torque v. Carrillo*, 1 Ariz. 336, 25 Pac. 526; *Hallenbeck v. Garst*, 96 Iowa, 509, 65 N. W. 417.

of the verdict. Obviously this should be done at the earliest practicable moment, so that upon a decision of the motion either party would be in time to move for a new trial. Upon such motion the testimony of jurors might be held admissible. This suggestion is made in view of its analogy to the approved practice of correcting findings and setting aside orders granting or denying new trials on the grounds of mistake, inadvertence, etc. But as to the evidence of jurors in support of the motion, it must be admitted that the reasoning against it would be as strong as when sought to assail their verdicts generally. On the other hand, it may be said that the correction of a verdict is a different matter from an attempt to overthrow it. For a case of mistake as to evidence or misunderstanding of instructions, and the like, alleged to be responsible for a verdict, it would appear preposterous to allow an exception to the general rule. Aside from the reasons upon which the rule itself is founded, there is no necessity for its relaxation because the party would still be at liberty to attack the verdict as against law, for insufficiency of evidence or for errors in law.

In a New York case the affidavits of jurors were held admissible to show that their answer to a specific question submitted to them by the court was due to an entire misunderstanding of its meaning owing to the ambiguity of its phraseology.²⁰² But it would seem that a more appropriate attack would have been grounded upon irregularity of the court. It appears to be well settled, where the general rule of disqualification is in force, that a misunderstanding of instructions cannot be shown by the testimony of jurors,²⁰³ or that by any means or for any cause a juror was induced to assent to a verdict which the jury have returned into court.²⁰⁴

²⁰² *Webber v. Reynolds*, 32 App. Div. 248, 52 N. Y. Supp. 1007.

²⁰³ *Murphy v. Murphy*, 1 S. Dak. 316, 47 N. W. 142; *Gaines v. White*, 1 S. Dak. 434, 47 N. W. 524; *Castle v. Greenwich Fire Ins. Co.*, 45 N. Y. Supp. 901; *People v. Flynn*, 7 Utah, 378, 26 Pac. 1114, holding that affidavits of jurors showing misunderstanding of instructions not admissible; *Coil v. State*, 62 Neb. 15, 86 N. W. 925, holding that a juror will not be permitted to testify that he misunderstood the testimony of a witness.

²⁰⁴ *People v. Kloss*, 115 Cal. 567, 578, 47 Pac. 459; *Polhemus v. Heiman*, 50 Cal. 438. See, also, *State v. Senn*, 32 S. C. 392, 11 S.

On motion for new trial for disqualification of a juror, the juror cannot testify to his disqualification in contradiction of his testimony on voir dire.²⁰⁵

It has been held that while a juror's affidavit will not be received to impeach his verdict, if objected to, yet if admitted without objection, it should be considered.²⁰⁶ But courts must take cognizance of the reasons of public policy underlying the rule, and of the fact that such affidavits would, if considered, infringe the rule and often violate the secrecy of the juryroom. Courts would generally be held bound, for these reasons to disregard such affidavits, even in the absence of any objection.

Affidavits of jurors are freely admitted to rebut evidence alleging misconduct, and to sustain their verdicts as against all manner of attack.²⁰⁷

§ 410. Of the production of evidence at hearing.

Statutes are found in nearly all the states specifically providing how the proceeding for a new trial may be instituted and upon what form of proof it may be heard. Usually, if not universally, the records and files and the proceedings and evi-

E. 292, *State v. McNamara*, 100 Mo. 100, 13 S. W. 938. In the first of these cases the court said: "When they came into court the verdict was read by the foreman, and recorded by the clerk, and then again read to the jury, who were asked if that was their verdict. No juror dissented, and the polling of the jury was waived. A juror cannot be allowed to impeach a verdict, to which he has thus assented, by swearing that he did not understand it, or that he was too timid and confused to express his dissent at the time when he ought to have dissented": See, also, *Polhemus v. Heiman*, 50 Cal. 438, 441; *People v. Azoff*, 105 Cal. 632, 39 Pac. 59.

²⁰⁵ *State v. Whitesides*, 49 La. Ann. 352, 21 South. 540. The rule stated in the text was held inapplicable where a juror asked a witness for the accused a question as to a material and important matter, and when the same had been answered, replied to the witness that the latter had knowingly testified to that which was untrue, and was aware that the juror so knew. Such conduct was held to show, prima facie, that he was not unbiased and impartial, and there was good cause for a new trial: *Smalls v. State*, 102 Ga. 31, 29 S. E. 153.

²⁰⁶ *Winn v. Reed*, 1 Mo. App. 456.

²⁰⁷ *State v. Gay*, 18 Mont. 51, 44 Pac. 411; *Hill v. State*, 91 Ga. 153, 16 S. E. 976; *McCormick v. Monroe (City of)*, 2 Mo. App. 1062. See, also, ante, chapter 9.

dence at the trial are proper matters for consideration, either alone, or in connection with affidavits. Perhaps in one or two states the statutes should be so construed as to permit the motion to be heard upon oral testimony alone or upon affidavits and depositions, and also oral evidence. In California and states having similar statutes and code provisions a construction which would permit a hearing upon oral evidence would seem impossible. In support of this view the following reasons are offered: The movant must elect at the outset upon what he will have his motion heard, and must serve his notice designating the matters upon which it will be heard. In so designating, he is restricted by the statute either to matters already before the court or to other matters to be produced by him in a particular form. To permit him to change the mode of proof at the hearing after serving and filing such notice, and to have the whole matter heard on oral evidence, would not only be a departure from the express mandatory terms of the statute, but would be unjust to the opposition who, without notice, might not be prepared for a hearing in that form. The statute makes no provision for notice of such motion on oral evidence. The same objections would lie against having the matters heard orally in part. A discretionary power of the court to permit the oral examination or cross-examination of affiants would be often prejudicial, unless it had the power to require such examination. But it could not be even plausibly insisted that the court could require either party to produce his affiants after they had procured, filed and served their affidavits according to the statute, even if within the jurisdiction of the court, or to refuse to receive or consider such affidavits in case the affiants were not produced. Suppose, however, that, for instance, the opposition produces in court one of the movant's affiants and proceeds under this alleged discretionary power of the court to cross-examine him, greatly to the detriment of the showing made by that particular affiant. Suppose the movant has ample basis for a new trial on other affidavits which, however, are fully contradicted and overcome by those of the opposition. But those affiants for the opposition happen to be beyond the reach of a subpoena or non est inventus, whereas if the movant could produce them, he could, by cross-examination, completely destroy the force and effect of their affidavits. The

injustice of permitting an oral hearing in part is susceptible of illustration in great detail. But sufficient is already suggested. In the case of other motions, the moving party may undoubtedly elect in advance whether he will have his motion heard upon affidavits or oral evidence, or both; but here the express terms of the statute would appear to leave no such discretion either to the court or the parties.

It may be properly remarked however, that if a party, even in ordinary instances of motions, gives notice and states in the notice that it will be presented upon affidavits and is then permitted to have it heard upon oral evidence it is in effect a hearing without notice, and should be held to be an abuse of discretion on the part of the court. The same should be held of an act of the court permitting the opposition to call and orally examine witnesses whose affidavits have been served, filed and read on the motion of whose direct or cross-examination the movant has had no notice, and for which he has had no opportunity to prepare. The proper practice is for the opposition desiring to cross-examine the affiants to take their depositions upon notice, or if the affiants cannot be found to take other depositions, or procure other affidavits, to prove that and also any other facts to overcome the matters set forth in the affidavits. Such depositions could be taken before the judge who is to hear the motion or before a court commissioner or other officer under the court's immediate supervision, or elsewhere and otherwise if necessary.

It has never been decided by the supreme court of California that a party may, as of right, orally examine, or cross-examine, witnesses at the hearing of a motion for a new trial, but rather the contrary. It has been suggested rather than decided, however, in three cases that it is within the discretion of the lower court to allow it.²⁰⁸ The Colorado and Idaho courts have, however, expressly sanctioned the discretionary power of the trial court to have witnesses brought before it for oral examination.²⁰⁹ The taking of depositions in the

²⁰⁸ *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719; *People v. Tucker*, 117 Cal. 229, 49 Pac. 134; *People v. Sullivan*, 129 Cal. 557, 62 Pac. 101. See, also, *State v. Magers*, 36 Or. 38, 58 Pac. 892.

²⁰⁹ *Schoolfield v. Brunton*, 20 Colo. 139, 36 Pac. 1103; *State v.*

manner above suggested will secure the testimony of unwilling witnesses and provide ample protection to the parties. Such course received express sanction in *Saltzman v. Sunset Tel. etc. Co.*,²¹⁰ where the court said: "The deposition of the deputy sheriff, taken in open court, must be regarded as an affidavit. If he refused to make an affidavit, no other course was open to plaintiff, who should not be deprived of his testimony because of his unwillingness." The party desiring to take depositions for use on the motion should make the proper showing by affidavit and should probably obtain an order for the purpose. The affidavit should show, among other matters, any facts rendering it necessary to take the deposition. This is suggested in view of the fact that codes and statutes on the subject define depositions and affidavits differently, and the use of a deposition as an affidavit is not the usual course nor is it a matter of common right. Of course the respective parties have equal right herein.

§ 411. Of hearing before judge other than that trying the case.

With respect to a succession of one judge to the office held by another before whom an action was tried pending a proceeding for a new trial, there is no lapse thereof or loss of power on the part of the successor in the matter of hearing and disposing of the motion in any state where the proceeding is independent of the main case.²¹¹ In California the same question is involved where there are more superior judges than one in a county. The question has been presented to the supreme court in several cases where pending the motions the cases or

Davis (Idaho), 53 Pac. 678. See, also, *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046.

²¹⁰ 125 Cal. 501, 503, 58 Cal. 169. See, also, *Llewellen v. Levy* (Pa. Com. Pl.), 33 Week Notes Cas. 310.

²¹¹ *Gleaves v. Wood*, 78 Mo. App. 351. Held otherwise under the circumstances of the case in *American Cent. Ins. Co. v. Neff*, 43 Kan. 457, 23 Pac. 606, where it was decided new judge should grant a new trial. But see *Tombstone M. & M. Co. v. Way Up Mining Co.*, 1 Ariz. 426, 25 Pac. 794, holding that although the motion be passed upon by another judge than the one who tried the case, and he overrules the motion, yet the findings of fact will not be disturbed on appeal, if there is substantial evidence to sustain them.

the hearing of the motions were transferred from one department to another. In such cases the power of the judge of the department to which the transfer was made to hear and decide the motion has been invariably affirmed. The constitution of California²¹² on the subject of superior courts, provides that there may be held "as many sessions of said court at the same time as there are judges thereof," and "the judgments, orders, and proceedings of any session of the superior court held by any one or more of the judges of said courts, respectively, shall be equally effectual as if all the judges of said respective courts presided at such sessions." In *Carter v. Lothian*,²¹³ the court, in overruling an objection that the hearing and determination of a motion for a new trial had been transferred from the department of the superior court of Los Angeles county in which the case was tried to another department of that court, said: "Under the present constitution, whatever the population or amount of business, there is but one court of general jurisdiction in each county, to wit, the superior court. This court may be, and is provided with such number of judges as is required to transact the judicial business before said court. The so-called departments are unknown to the constitution, but have been adopted for convenience, by the judges, in apportioning the business before said court, which they are authorized to do by the constitution. . . . By this scheme, where there is more than one judge provided for the court, such judges may interchanging among themselves in holding court, and in case one be sick, absent, or engaged in the trial of other causes, another judge of such court can step in and fill his place, and thus prevent the interruption of judicial business. Any judge therefore, of the superior court of Los Angeles county had jurisdiction to hear and determine the motion for new trial in this case." The judge hearing the motion in case of a succession or transfer has all the powers in passing upon and deciding the motion that could have been exercised by the judge who tried the case. In *Jones v. Sanders*,²¹⁴ the court said: "It is

²¹² Cal. Const., art. 6. §§ 6, 7.

²¹³ 133 Cal. 451, 454, 65 Pac. 692. See, also, *Garton v. Stern*, 121 Cal. 347, 53 Pac. 904; *Churchill v. Flournay*, 127 Cal. 355, 361, 59 Pac. 791.

²¹⁴ 103 Cal. 678, 37 Pac. 649. See, also, *Macy v. Darila*, 48 Cal.

claimed for appellant that as Judge Hoge presided at the trial his findings upon all the questions of fact should be treated as conclusive. We do not understand this to be the rule applicable to a case like this. It is true that this court will not review findings when there is a substantial conflict in the evidence, but it has been repeatedly held that upon motion for a new trial it is the duty of the trial court to examine the evidence, even though it be conflicting, and if dissatisfied with the conclusions reached, to grant a new trial: And the rule is the same whether the motion is heard by the judge who tried the case or by some other judge, whose only knowledge of the facts is obtained from the record."

§ 412. Several new trials in same case.

In the absence of a statute on the subject, there is no limitation upon the power of courts to grant successive new trials to the parties in the same case,²¹⁵ and statutes limiting the power are strictly construed. Accordingly, under a statute providing that only one new trial should be allowed to either party except; First, where the triers of the fact have erred in a matter of law and secondly, where the jury were guilty of misbehavior, etc., it was held that the trial court might grant a new trial on the ground that the verdict was against the weight of the evidence regardless of the number of new trials that may have been granted to each party on other grounds.²¹⁶

646; *Bander v. Tyrrel*, 59 Cal. 99; *Blum v. Sunol*, 63 Cal. 341; *Wilson v. California C. R. R. Co.*, 94 Cal. 166, 29 Pac. 861.

²¹⁵ *Richalson v. Freeman*, 56 Kan. 463, 43 Pac. 772. In this case it was held that if the verdict did not meet with the approval of the trial court, it should be set aside, and a new trial granted although there were three prior disagreements. See, also, *Hodge v. Lehigh Val. R. Co. C. C.*, 56 F. 195. See, also, *Vickery v. Central R. R. Co.*, 89 Ga. 365, 15 S. E. 464. But in *Van Doren v. Wright*, 65 Minn. 80, 67 N. W. 668, 68 N. W. 22, it was held, where three successive verdicts in favor of the same party had been set aside, on the ground that they were not justified by the evidence, that it was an abuse of discretion to set aside a fourth verdict on the same ground, it being fairly justified by the evidence.

²¹⁶ *Dean v. Fire Assn. of Philadelphia*, 2 Mo. App. 1282. See, also, *Kreiss v. Missouri Pac. Ry. Co.*, 131 Mo. 533, 33 S. W. 64, 1150.

CHAPTER 20.

NEW TRIALS GRANTED ON COURT'S OWN MOTION.

§ 413. Is exercise of special extraordinary jurisdiction.

§ 414. The power exclusively statutory—Comparison with jurisdiction at common law.

§ 415. Time within which the order may be made.

§ 416. New trial as result of court's relief from result of accident.

§ 413. Is exercise of special extraordinary jurisdiction.

There is one condition warranting trial courts in granting new trials without a resort by either party to a motion or to any proceeding whatever, and without a hearing which, as has been shown, is ordinarily one of the essential steps. It is where, adopting the language of the California Code of Civil Procedure¹ "there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice." That it was intended that the grounds for the action of the court must actually exist and appear as a fact to a discerning mind, and not merely so as to satisfy the

¹ Section 662. The entire section reads as follows: "The verdict of a jury may also be vacated, and a new trial granted by the court in which the action is pending on its own motion, without the application of either of the parties, when there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice. The order of the court may be reviewed on appeal in the same manner as orders made on motions for a new trial, and a statement to be used on such appeal may be prepared in the same manner as statements after a motion is heard upon the minutes of the court, as provided in section 661." So far as is disclosed by the adjudications, the terms "passion or prejudice" are merely a convenient expression signifying that a verdict cannot be accounted for: *Bartholomew v. Speer* (Pa.), 7 North Co. R. 152.

caprice of the particular judge, is seen by the fact that it is further provided that a statement to be used on appeal from the order may be prepared by any party desiring to appear from the order, and that "the order of the court may be reviewed on appeal in the same manner as orders made on motions for a new trial."

Such orders are not in the usual course of procedure, but rather the exercise of a special and extraordinary, or at least a summary jurisdiction, which must find support, if at all, in the record, where must appear the jurisdictional prerequisites mentioned in the statute. In the decisions thus far rendered, wherein such statutes were construed, nothing is found to indicate the concession of anything whatever to the discretion or superior knowledge of trial courts. But it must be noted that the authorities are not uniform upon the proposition just stated.²

² See *Kohler v. Fairhaven etc. Ry. Co.*, 8 Wash. 452, 36 Pac. 253, 681, where Hoyt, J., delivering the opinion, after fully stating the facts, said: "Under the provisions of our statute it is made the duty of the trial court, when a proper motion has been interposed, to determine the question as to whether or not the damages awarded by the jury are excessive. In performing this duty the court must determine as to the effect of the evidence introduced in the course of the trial. From such evidence it must, as a question of judicial discretion, determine whether or not the damages as assessed by the jury are so excessive as to make it to appear that they were awarded under the influence of passion or prejudice. It is a universal rule that when a matter is left to the discretion of the court its exercise of such discretion will not be interfered with by an appellate court unless it is made affirmatively to appear from the record brought up on appeal that such discretion has been improperly exercised. We see no reason for holding that in exercising the particular discretion vested in a trial court in determining as to whether or not there should be a new trial its decision should be given less force than in other matters, for while it is true that the verdict of a jury is presumably warranted by the evidence until the contrary is made to appear, the statute has made it the duty of the lower court to review their action, and when it has done so, and in the exercise of the discretion vested in it, determine that it was not warranted, the presumption as to its correctness is taken away, and the decision of the court must stand unless the appellate court is satisfied from all the circumstances surrounding the case that in so deciding the court made a mistake." Chief Justice

§ 414. The power exclusively statutory—Comparison with jurisdiction at common law.

Prior to any recognition of a power in the common-law courts to grant new trials, the only redress, if it might be so termed, was the writ of attaint, in the nature of a punishment inflicted upon jurors who had returned a verdict contrary to law and the evidence. In cases where this was not permissible according to the forms of procedure and precedents then in use, the party aggrieved was compelled to resort to the courts of chancery. But in equity relief could only be given indirectly in the form of a perpetual injunction if the adverse party should refuse to consent to a new trial. At length the causes for which new trials might be granted came to be more distinctly defined and extended, and with this came a discontinuance of resort to courts of equity. But such extension was attended, where a motion for new trial by a party was resorted to, by a restriction of the jurisdiction to the established causes or grounds, and made to conform more and more to recognized and approved forms of procedure. But common-law courts, while not exercising distinctive jurisdiction in equity, nevertheless assumed and were conceded the power to apply equitable principles to the remedies within their jurisdiction, and at length their power to grant new trials in any case where it appeared to them necessary in order to prevent a failure of justice became firmly established. Their power to do so was,³ and where there are no statutory restrictions or methods of procedure, as in the federal courts, still is,⁴ plenary. They might thus grant a new trial whether either party made application therefor or not, and even notwithstanding a pending application. Accordingly, in Massachusetts, where a statute provided that "the courts may, at any time before judgment in a civil action, set

Dunbar filed an able dissenting opinion. A petition for rehearing was denied upon other grounds than those stated in the above extract. The case cannot be considered authoritative.

³ See *Weber v. Kirkendell*, 44 Neb. 766, 63 N. W. 35. See, also, *Bank of Willmar v. Lawler*, 78 Minn. 135, 80 N. W. 868, holding in aggravated case of misconduct by jury that the court could dispense with written notice of motion, and in exercise of its common-law right, grant a new trial on its own motion.

⁴ See *Felton v. Spiro* (C. C. A.), 78 Fed. 576, 24 C. C. A. 321; *Wright v. Southern Exp. Co.* (C. C.), 80 Fed. 85.

aside the verdict and order a new trial for any cause for which a new trial may, by law, be granted," it was held that the court might exercise this power pending a motion for new trial by a party, and though the parties did not, in the application so made, make any showing entitling them to a new trial.⁵ It is difficult, however, to reconcile this decision with the well-settled rule of practice, that any grounds for new trial, not stated in the notice of intention or motion, shall be deemed to be waived.⁶ At any rate, it is well settled that courts are wanting in the power to grant new trials of their own motion for any cause, where grounds are specified and methods of procedure provided by statute, by which parties may proceed to obtain the relief, unless such power be conferred by such provision as is found in the California code above referred to. This was settled as to the courts of that state prior to the existence of such provision.⁷ Nor can the court, under such pro-

⁵ *Ellis v. Ginsburg*, 163 Mass. 143, 39 N. E. 800.

⁶ See ante, § 368.

⁷ See *Humiston v. Smith*, 21 Cal. 129; *Kelly v. Larkin*, 47 Cal. 58; *Townley v. Adams*, 118 Cal. 382, 384, 50 Pac. 550. See, also, *State v. Adams*, 84 Mo. 310. In *Dorsey v. Barry*, 24 Cal. 449, the court said: "It does not necessarily follow that if the appellate court can order a new trial in the inferior court that the inferior court can of its own motion grant a new trial. It will be remembered that in the early history of the common-law courts of England the court of chancery directed a new trial at law in those courts, and it enforced its decree under the penalty of a perpetual injunction if the adverse party should refuse. The power to grant new trials and the mode of its exercise are dependent mainly, if not entirely, upon the statute in both civil and criminal actions. The grounds upon which it may be obtained and the manner of applying for and procuring it are therein prescribed." In *State v. Adams*, supra, it is said: "For the causes named in section 3705 the court of its own motion may set aside the verdict. Its common-law power in that respect is not prejudiced by the statute. On other grounds than those specified in that section the court cannot of its own motion set aside the verdict." Section 4 of the Code of Civil Procedure provides as follows: "The rule of the common law, that statutes in derogation thereof are to be strictly construed has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice."

vision as this, grant a new trial of its own motion for the existence of any of the grounds upon which it might be granted on motion of a party. In *Townley v. Adams*,⁸ the court had entered an order reading as follows: "The court, of its own motion, orders that the said verdict as rendered be, and the same is hereby, set aside and a new trial ordered, upon the ground, and no other, that the evidence as given does not justify the verdict as rendered, and that said verdict is against the law and the evidence." From this order, the plaintiff in whose favor the verdict had been rendered appealed, claiming, upon the facts of record, that the court, in making it, had exceeded its jurisdiction. The supreme court sustained this contention. After quoting section 662, the court said: "If the section last quoted is to be construed as a limitation upon the power of the court to grant a new trial, then, before the exercise of that power can be upheld, it must be made to appear either: 1. That there has been such a plain disregard by the jury of the evidence as to satisfy the court that the verdict was rendered under a misapprehension or under the influence of passion or prejudice; or 2. That there has been such a plain disregard of the instructions as to satisfy the court that the verdict was so rendered. That the provisions of the code do define the powers of the court in granting a new trial, and limit the exercise of those powers, we entertain no doubt. . . . The reason given by the court for granting the new trial, it may be noticed, is not amongst those for which such an order may be made of the court's own motion; but it is amongst those for which the court may grant a new trial upon application of the aggrieved party, and after the exercise of the very valuable right secured in such cases to the party resisting the motion to convince the court, if possible, by argument, that the reason is not well founded. Where, however, the court grants the new trial of its own motion, the party against whose interests the order is made is deprived of this substantial right, and, therefore it is that the lawmakers have restricted the court to cases of plain and gross abuse by the jury. But, while the reasons thus given by the court are not such as will sustain the order, it will not be reversed if, upon careful inspection of the rec-

⁸ 118 Cal. 382, 50 Pac. 550.

ord, it may be seen that the order may be supported upon valid grounds. It thus becomes necessary to consider: 1. Whether there was a plain and palpable disregard by the jury of the evidence; and 2. Whether there was a plain and palpable disregard by the jury of the instructions." The court then proceeded to discuss the evidence and instructions in the record, failing to find therein either of the reasons upon which the statute authorizes the trial court to grant a new trial of its own motion, and concluded as follows: "Properly to emphasize the distinction which exists between the right of a court to grant a new trial upon application of a party, and the right to grant it upon its own motion, it should be said that the foregoing considerations have nothing to do with what may be conceived to be the weight of evidence. Thus, it might well have been that, had the court, upon application of defendant and after exercise by plaintiff of his right of argument, granted the new trial, this court, under its well-settled rules, would not have considered the question of preponderating evidence, and would not have disturbed the order of the trial court after such hearing; but where, as here, the court, of its own motion, sets aside the verdict of the jury, then, as has been said, it must be made to appear that the jury plainly, palpably, grossly, disregarded either the evidence or the instructions of the court. In this case, it is quite apparent that such gross disregard has not been shown to exist."

In *Flugel v. Henschel*,⁹ the court, after quoting the statute of North Dakota, which is the same herein as that of California, said: "The abridgment of the common-law right of a trial court to vacate a verdict on its own motion became highly proper, and indeed necessary, after the legislative branch of the government had made ample provision to facilitate the setting aside illegal and unjust verdicts by means of a motion made for that purpose by a party to the action whose rights have been prejudiced by any such verdict. Under the statutes regulating motions for a new trial, a defeated party has a sufficient remedy as against an illegal verdict, whether the vice of the verdict lies in an error of law or an error of the jury

⁹ 6 N. Dak. 205, 209, 69 N. W. 195. See, also, *Lang v. Commissioners*, 5 Okla. 128, 47 Pac. 1063.

in considering the evidence. Taking all the statutes relating to the subject of new trials into account, it becomes apparent that a trial court is not justified in vacating a verdict upon its own motion upon the ground merely that the verdict is not justified by the evidence, or is contrary to law, or for errors of law occurring during the trial of the case. All of these grounds are specifically enumerated in the code as grounds for a motion for a new trial to be made by the party aggrieved by the verdict. To justify the action by the court the case must be gross, and one obviously requiring immediate action." The same construction was given by the supreme court of South Dakota to substantially the same statute in force there; and it was there held that the verdict should not be vacated by the court of its own motion unless there had been such clear disregard of the instructions or the evidence that the court is at once satisfied without argument or mature reflection that the verdict was the result of passion or prejudice, or was rendered under a misapprehension of the court's instructions.¹⁰

§ 415. Time within which the order may be made.

Irrespective of the said limitations now well established, having reference to the subject matter and grounds upon which the jurisdiction may be exercised, there is a limitation as to the time after the return of the verdict within which such an order may be made. No more definite proposition can be advanced with reference to this time limit than that it should be made within the time fixed by the statute for the losing party to institute a proceeding to obtain a new trial in his own right. No other limitation would appear necessary for the full protection of the party prevailing upon the trial. In *Mizener v. Bradbury*,¹¹ the verdict was rendered on the twenty-third day of June, 1897, and an order was made granting a stay of proceedings until the further order of the court. Subsequently, on July 21, 1897, the court, on its own motion, in the absence of the parties, made the following order: "There having been

¹⁰ *Clement v. Barnes*, 6 S. Dak. 483, 61 N. W. 1126. It should appear that the jury were influenced by prejudice, passion, partiality or corruption, or unwittingly fell into a plain mistake: *Lucier v. Lavase*, 66 N. H. 141, 20 Atl. 249.

¹¹ 128 Cal. 340, 60 Pac. 928.

such plain disregard by the jury of the instructions of the court and the evidence in this case as to satisfy the court that the verdict herein was rendered under a misapprehension of the instructions of the court, it is therefore ordered by the court, of its own motion, that the verdict heretofore rendered herein be set aside, and that a new trial be granted." The order was made under the power given by section 662 of the Code of Civil Procedure, and appellant contended that it was made after the time for notice of a motion for a new trial had expired and that the court had no power to make the order. The appellant further contended that, to hold that the court might delay its action, as in that case, would authorize it to grant a new trial after the defeated party had lost the right under the statute to ask for a new trial, and that, if the court could grant a new trial on its own motion one month after verdict, it might do so five or any number of months thereafter. The court chose not to decide the point which was thus squarely presented for decision, preferring to pass upon the grounds claimed in the order to exist, in connection with the showing made by the record, and upon such review reversed the order.

But the same question has been expressly passed upon in two cases in North Dakota and in one case in South Dakota in substantial accordance with the view of the question above expressed, the code provisions in those states being the same as that of the California code.¹²

§ 416. New trial as consequence of court's relief from result of accident.

A distinction must be made between cases in which a new trial results from relief from accident, mistake, inadvertence and the like, and the exercise of jurisdiction under this head. The language of the courts, in speaking of such forms of relief, is sometimes calculated to mislead. They speak of the court's power to grant a new trial in such cases when, in fact, it is merely the exercise of power to relieve from what would otherwise be an unjust result of action taken against a party with-

¹² Gould v. Duleth Elevator Co., 2 N. Dak. 216, 50 N. W. 969; Flugel v. Henschel, 6 N. Dak. 205, 69 N. W. 195; Clement v. Barnes, 6 S. Dak. 483, 61 N. W. 1126.

out his fault. True, the act of the court sometimes results in a new trial; but the result should not be confounded with the nature of the jurisdiction thus exercised or the principal purpose thereof. In *Heinrichsen v. Smith*,¹³ it was held that a judgment was properly vacated, a new trial being a necessary result, where the trial judge had died before signing a bill of exceptions which presented disputed issues of fact, and the judge who succeeded him in office refused to sign the bill because of his ignorance of the facts. Now, under the laws of Oregon, as construed by its supreme court, a trial court may grant relief from a judgment in such case by setting aside the judgment, which, to be of any benefit to the party against whom it has been entered, must be followed by a retrial. In such case, the jurisdiction exercised is equitable in character. The court is not set in motion to grant a new trial primarily, but to relieve from the result of accident, and the new trial follows as a result of such relief. Without the new trial, or retrial, the court's action would either be devoid of benefit to the party, or deprive the owner of the judgment of the right to proceed for a judgment against which no such objection would be urged.¹⁴ This jurisdiction has been frequently exercised by the English courts as well as by state courts in cases where parties were, without their fault, deprived of their bills of exceptions, no statutes standing in the way.¹⁵

¹³ 29 Or. 475, 42 Pac. 486, 44 Pac. 496. See, also, post, chapter 47.

¹⁴ See *Thomas v. Morris*, 8 Utah, 284, 31 Pac. 446, holding that where a motion by defendant to set aside and vacate "the judgment and decree" on the ground of excusable absence of defendant and his counsel is sustained, it is not error to also order a new trial without request therefor, since another decree could not be entered without a new trial; *St. Francois Mill Co. v. Sugg*, 142 Mo. 364, 44 S. W. 249, holding that a new trial should be granted where a party is deprived of the opportunity to have the judge who tried the cause, because of the expiration of his term of office, review the findings therein, on a motion for a new trial; *Manning (City of) v. German Ins. Co.*, 107 Fed. 52, holding that an order for a new trial, where the application for it is made in due time, is the proper remedy for the incapacity of the judge who tried the case to settle and sign the bill of exceptions.

¹⁵ See *Newton v. Boodle*, 54 Eng. Com. L. Rep. 794; *Benett v. Steamboat Co.*, 81 Eng. Com. L. Rep. 28; *Stebbins v. Field*, 41

In strict legal sense, such action should not be classed with the jurisdiction to grant new trials of the court's own motion, exercised at common law, or under such statutes as were above discussed.

Incidentally, it may be remarked that the facts shown in the Oregon case above mentioned would be no ground for relief in the absence of jurisdiction of extraordinary scope. Statutes are found in some of the states under which relief could be obtained in such cases.

Mich. 373, 2 N. W. 190; *People v. Judge*, 41 Mich. 726, 49 N. W. 925; *Evans v. Humphreys* (D. C.), 9 App. D. C. 392.

CHAPTER 21.

EFFECT OF PROCEEDING ON STATUS OF PARTIES AND UPON RIGHTS UNDER THE ACTION.

- § 417. No direct and essential connection between proceeding for new trial, and proceedings in main case.
- § 418. Proceeding for new trial, as bearing upon enforcement of judgment.
- § 419. Relation of pending motion to ancillary process and auxiliary proceedings.
- § 420. Benefit of granting motion exclusively to those joining in motion.
- § 421. Effect of order granting upon status of parties at retrial.
- § 422. No waiver by proceeding as a general rule.

§ 417. No direct and essential connection between proceeding for new trial and proceedings in main case.

The motion may be granted even after the judgment has been affirmed upon appeal; and an order granting or denying a new trial may be reviewed upon an appeal taken in time, notwithstanding the judgment may be final;¹ or even though the appeal from the judgment has been dismissed,² or vice versa.³

¹ See ante, § 14; post, § 717.

² *Fulton v. Cox*, 40 Cal. 101, 105; ante, § 14; post, § 717.

³ *Towdy v. Ellis*, 22 Cal. 659, where one party appeals from the judgment and it is affirmed, this does not prevent another party securing on appeal the reversal of an order denying his motion for a new trial: *Donner v. Palmer*, 45 Cal. 180, 183, the court saying: "The affirmance of that judgment upon the other appeal taken by the defendants did not operate to oust the authority of this court to reverse it upon the appeal taken by the intervener from the order denying his motion for a new trial. It frequently occurs in practice that a judgment affirmed upon the judgment roll, is subsequently reversed through the instrumentality of an appeal taken from an order determining a motion for a new trial, for the proceedings are recognized as being entirely independent of each other." Where the appeal from the judgment was in time, and from the order denying a new trial was too late, it was held that the appellant was

The two appeals may be, and usually are, presented together. As to those errors which may be reviewed on either appeal, the remedy is concurrent, and the party may pursue either appeal and abandon the other.⁴

The filing of a stay bond upon appeal from the judgment does not stay action upon a motion for a new trial; and the court has power, pending such appeal, to grant a new trial.⁵

Neither is the entry, nor even the collection of the judgment, a bar to new trial.⁶ Nor, on the other hand, can an ap-

not precluded from assigning as error a matter which he had also assigned in the motion for new trial and which was decided against him there: *Carpentier v. Williamson*, 25 Cal. 156, 168. In this case the court said: "The respondents now insist that the court cannot consider on this appeal the error relied on, for the reason that the appellant assigned the same error in a motion for a new trial which was decided against him, and not having appealed from the order denying a new trial, he is concluded by that ruling. We think there is no force in that objection. An error of law in admitting or rejecting testimony is subject to be reviewed on appeal from the judgment when the ruling is made a part of the record by a bill of exceptions or by a statement on appeal. It is true, the same error may also be reviewed on appeal from an order denying a new trial. But the two modes are independent of each other. The appeal from the judgment does not depend upon the motion for new trial. The latter proceeding is subsequent to the judgment. An appeal from the judgment may be taken without waiting for the determination of a motion for a new trial, or the two appeals may be, and usually are, prosecuted together. As to those errors which may be reviewed on either appeal, the remedy is concurrent, and the party may pursue either appeal and abandon the other." To same effect, *Hastings v. Halleck*, 13 Cal. 207; *Towdry v. Ellis*, 22 Cal. 659; *Forsythe v. Richardson*, 1 Idaho, 461. Same ruling in *Hawkins v. Hubbard*, 2 S. Dak. 634, 51 N. W. 774, on motion to dismiss double appeal; *Rayner v. Jones*, 90 Cal. 81, 27 Pac. 24, holding that court can pass on motion for new trial even when appeal already taken from judgment. To same effect *Naglee v. Spencer*, 60 Cal. 10.

⁴ *Carpentier v. Williamson*, 25 Cal. 167. While the same points may be presented in both appeals, the supreme court will not, after having once reviewed and passed upon a point, review it again when presented in another form in the same case. See post, § 691.

⁵ *Knowles v. Thompson*, 133 Cal. 245, 65 Pac. 468.

⁶ *Smith v. Lidgerwood Mfg. Co.*, 69 N. Y. Supp. 975, 60 App. Div. 467; *Cunningham v. Nassau Electric R. Co.*, 58 N. Y. Supp. 22, 40 App. Div. 211; *Fisher v. Emerson*, 15 Utah, 517, 50 Pac. 619; *Cox v. Baker*, 113 Ind. 62, 14 N. E. 740.

peal be defeated by a failure to file a motion for a new trial within the time allowed by law.⁷

From the absence of any dependence of the motion upon the main action, it also results that the pendency of an appeal from the order does not extend the time for taking an appeal from the judgment.⁸

In reference to the effect of granting a new trial upon the judgment, and upon the status of parties and other proceedings, some of the language of the courts and writers on new trials and subjects relevant thereto requires limitation and revision. In *Kower v. Gluck*,⁹ there was an order granting a new trial on motion of defendants, from which order the plaintiff appealed, and defendants appealed from the judgment, notwithstanding the granting of their motion for a new trial. The supreme court affirmed the order and dismissed their appeal from the judgment, saying: "The order granting a new trial had the effect to vacate the judgment from which the defendants appealed, and hence their appeal is inconsequential, and must be dismissed." This decision has been frequently cited as authority by the same court, but the decisions have never gone to the extent of declaring as an absolute rule or doctrine that, in such case, the vacation of the judgment was other than tentative—that is to say, it stood vacated pending the appeal conditionally upon the affirmance of the order on appeal to be restored to its original status as a valid subsisting judgment, if the order appealed from should be reversed. In *Pierce v. Birkholm*,¹⁰ the doctrine of *Kower v. Gluck* was limited and

⁷ *Littlejohn v. Miller*, 5 Wash. 399, 31 Pac. 758.

⁸ *Bornheimer v. Baldwin*, 42 Cal. 27, 31.

⁹ 33 Cal. 401, 407, on point that granting new trial vacates the judgment, see *Thompson v. Smith*, 28 Cal. 527; *Wheeler v. Kassabaum*, 76 Cal. 90, 18 Pac. 119.

¹⁰ 110 Cal. 669, 673, 43 Pac. 205. To same effect: *Mountain Tunnel Co. v. Bryan*, 111 Cal. 36, 43 Pac. 410. The following cases have been frequently cited as sustaining a view contrary to that expressed by the court in this case: *Walden v. Murdock*, 23 Cal. 549, 83 Am. Dec. 135; *Thompson v. Smith*, 28 Cal. 528, 530; *Komer v. Gluck*, 33 Cal. 401, 407; *Wittenbrack v. Bellmer*, 62 Cal. 558; *Wheeler v. Kassabaum*, 76 Cal. 90, 18 Pac. 119; *Bronner v. Wetzlar*, 55 Cal. 419, 420.

other cases cited by counsel as approving its doctrine in the broad meaning attributed by them to its language, referred to by the court. The court, after stating the facts and renewing the contentions of counsel and citing the authorities cited by them, said: "It is true that in the case of *Kower v. Gluck*, supra, most strongly relied upon by defendants, there was, as here, an order granting a new trial, from which an appeal had been taken, and subsequently an appeal from the judgment. The two appeals were considered together, and the court determined that the appeal from the order must be affirmed; held, that the effect of the order granting a new trial being to set the judgment aside, the appeal from the judgment became inconsequential, and should be dismissed. This is all that is determined by the case, and to that extent it is obviously correct. If the language, which does not seem to have been carefully chosen to express the meaning of the court, implies anything further, it is not authoritative, because unnecessary to the determination of the question involved. The other cases cited need not be specially reviewed, as we regard them as sufficiently disposed of by what is said above. None of them, when properly considered, goes to the length contended for by defendant, or is necessary to sustain this motion. To sustain the doctrine urged by defendants would, not only in this, but in most instances of the kind, deprive the party of an opportunity to take advantage of the right of appeal afforded by the statute, and that upon grounds which to us seem wholly unsupported by either reason or authority." This case undoubtedly declares a true principle. Appeals both from the order and from the judgment do not, under any circumstances, conflict, no matter by whom taken. One of them may be nugatory, or inconsequential, or may be rendered so in consequence of the decision of the appellate court upon the other; but the right of appeal is in no wise affected by such contingency. In *Brooks v. San Francisco etc. Ry. Co.*¹¹ both parties appealed from an order granting a new trial on defendant's motion—the defend-

¹¹ 110 Cal. 173, 179, 42 Pac. 570. The pendency of a motion by defendant for new trial does not affect the right of plaintiff to amend his complaint, dismissing as to one or more of the defendants, and taking judgment against others: *Pullman's Palace Car Co. v. Fielding*, 62 Ill. App. 577.

ant from the portion imposing a condition and plaintiff from the balance of the order. Both orders were affirmed and an appeal by defendant from the judgment was dismissed.

The law governing the whole subject was so fully covered in the opinion in *Knowles v. Thompson*¹² as to justify a quotation therefrom, though a substantial repetition of much that has preceded. It was upon an application for a writ of mandate to compel the issuance of an execution after an order granting a new trial. The court, after fully stating the facts, as set forth in the petition, said: "It is contended by the petitioner that, upon perfecting the appeal from the judgment rendered in the lower court, by a filing of a supersedeas or stay bond, all further proceedings, including any action on the motion for a new trial, were suspended. This, however, is not so. Only such matters as are embraced within the judgment or order appealed from are stayed. Proceedings on motion for a new trial are not in direct line of the judgment, but are independent, and collateral thereto. The judgment may be at once entered, and even executed, while a motion for a new trial is pending. The motion may be heard and decided, and an appeal taken on its own independent record, while the proceedings on and subsequent to the judgment may be still regularly going on, and even an independent appeal taken in that line. An appeal from the judgment does not depend upon the motion for a new trial. The latter is subsequent to the judgment, and the appeal from the judgment may be taken without waiting for the determination of the motion for a new trial, and such appeal from the judgment may go on after the appeal from the order has been dismissed. And an affirmance of the judgment on a direct appeal therefrom does not prevent the court below from setting aside the verdict, or finding and judgment based thereon, and granting a new trial. And the dismissal of an appeal from the judgment is no bar to an appeal by the same party from an order denying his motion for a new trial."

§ 418. Proceeding for new trial as bearing upon enforcement of the judgment.

In the early judicial history of California, the erroneous doc-

¹² 133 Cal. 246, 65 Pac. 468, citing numerous authorities.

trine that the pendency of a motion for new trial stayed the execution of the judgment was clearly recognized.¹³ The contrary and correct view was first expressed by Sanderson, C. J., in *People ex rel. etc. v. Loucks*,¹⁴ as follows: "The notion which has prevailed hitherto that a motion or notice of motion for new trial of itself stays all proceedings upon the judgment until such motion has been determined is without foundation. The Practice Act contains no such provision; on the contrary, the reverse is at least implied. The one hundred and eightieth and one hundred and ninetieth sections provide when judgment shall be entered; and the two hundred and ninth provides that the 'party in whose favor judgment is given may, at any time within five years after the entry thereof, issue a writ of execution for its enforcement.' Upon this provision, the act contains no limitations whatever, and it must necessarily follow that the party in whose favor the judgment is entered is entitled to his execution immediately, as therein provided, and he cannot be deprived of his right, or delayed in its execution, by any mere act of the opposite party."

Trial courts have frequently exercised the discretionary power to stay execution pending the motion. This power to do so is recognized in the same opinion above quoted, in these words: "Doubtless this question might be regulated by a rule of court; but, in the absence of such a rule, a party desiring a stay of proceedings pending his motion for a new trial must obtain an order to that effect from the court, as in the case of a stay of the entry of judgment as provided in section 197. Upon such application, the court can grant the order unconditionally or upon terms according to the circumstances of the case. If a

¹³ *Lurvey v. Wells*, 4 Cal. 107; *Copper Hill Mining Co. v. Spencer*, 25 Cal. 11, 18.

¹⁴ 28 Cal. 69. To same effect, namely, that motion does not stay execution, see *Harris v. Barnhart*, 97 Cal. 546, 550, 32 Pac. 589; *Columbia Min. Co. v. Holter*, 1 Mont. 419; *St. Francois Mill Co. v. Sugg*, 142 Mo. 358, 44 S. W. 247. Fact that statement on motion for new trial has not been settled constitutes no ground for quashing the execution, even though the delay in the settlement was occasioned by plaintiff's attorney: *Jones v. Spears*, 56 Cal. 163. See, also, *Young v. Brehe*, 19 Nev. 379, 383, 3 Am. St. Rep. 892, 12 Pac. 564.

stay would be likely to jeopardize the judgment, an execution and levy might be allowed, and further proceedings thereafter stayed, or security for the payment of the judgment might be required. We think this question has been wisely left by the Practice Act to the sound discretion of the court."

But since the Code of Civil Procedure, section 664, has expressly recognized the power of the court to stay proceedings prior to entry of judgment, it is suggested that the power to stay execution after the judgment has been entered is at least doubtful. In Colorado, the rule first declared in California appears to be in force.¹⁵ The same rule holds good in criminal as in civil cases. Hence, the approval by the court, pending a motion for a new trial and for a stay of execution, of a bond conditioned for the defendant's appearance and obedience to all orders of the court, does not, by implication, stay execution of the sentence, and the defendant may be lawfully imprisoned pending the determination of the motion for a new trial.¹⁶

§ 419. Relation of pending motion to ancillary process and auxiliary proceedings.

Under an attachment, the sheriff acquires and holds a special property in the property attached, the general property remaining in the defendant. Upon the entry of judgment for the defendant in the action, the special property terminates, the attachment being ipso facto dissolved; nor does the pendency of a motion for a new trial have any effect to keep the attachment alive in favor of the plaintiff.¹⁷ Nor does the pend-

¹⁵ See *Hawley v. Baker*, 5 Colo. 118, where it was said: "While the result is in dubio, no duty rests upon the party ultimately to pay, and he ought not to be obliged to make compensation to the opposite party because this condition as to delay exists and continues for a time. A proceeding is still immature when a verdict is simply rendered, since no process can issue and no action can be maintained, and no lien on real or personal estate acquired."

¹⁶ *State v. Reynolds*, 14 Mont. 383, 36 Pac. 449.

¹⁷ *Rauft v. Young*, 21 Nev. 401, 32 Pac. 490. See, also, *Loveland v. Mining Co.*, 76 Cal. 564, 18 Pac. 682; *O'Connor v. Blake*, 29 Cal. 315; *Littlefield v. Davis*, 62 N. H. 492. In the first of these cases the court said: "From the moment the judgment was rendered the

ency of the motion interfere, in any way, with any collateral proceedings taken in the action had with a view to protecting the rights of the parties litigant with reference to the subject matter of the litigation, or making the judgment effectual. Accordingly, where, after the court had filed its findings of fact, and an order sending the case to a referee to take and state an account, a motion was made for a new trial, it was held that the motion did not stay the proceedings pending before the referee.¹⁸ Nor does the pendency of a motion for a new trial operate as a stay of proceedings, so as to deprive the court of

attachment was dissolved, the lien created by it was vacated, and the property released from the custody of the law; and upon the refusal of the sheriff to surrender the property, the defendant's remedy was by proceedings against the sheriff for the property, or the value thereof. When property is attached to secure the judgment which the plaintiff may recover, the sheriff acquires a special property in the chattels, defeasible by the plaintiff failing in his action. The general property remains in the defendant, and if judgment is rendered for him in the suit, the attachment is ipso facto dissolved. The special property acquired by the sheriff ceases, and if he detains the chattels after demand he is answerable in an action of trover. The fact that there was a motion for a new trial pending did not tend to keep the attachment in force. There is no provision in our statute authorizing the sheriff to retain the property after judgment in favor of the defendant was entered." And in the second case the court said: "An attachment is merely a creature of statute, its existence and operation in any case can contain no longer than the statute provides it may. And there is no express authority given to a sheriff to retain in his custody property seized by him under and by virtue of a writ of attachment issued out of a justice's court after a judgment in the action in which the attachment issued is rendered in favor of the defendant. No provision is made for his detention of it pending an appeal from such a judgment. In the absence of any such provision, it seems quite clear that, under section 553 of the Code of Civil Procedure, the defendant Kenworthy, after judgment in his favor, could make any disposition of the property which he could have made before it was attached, with like force and effect."

¹⁸ *Crowther v. Rowlandson*, 27 Cal. 376. See, on same subject, *Harris v. San Francisco Sugar R. Co.*, 41 Cal. 406; *Hinds v. Gage*, 56 Cal. 488; *Duff v. Duff*, 71 Cal. 516, 12 Pac. 570; *Arnold v. Sinclair*, 11 Mont. 567, 28 Am. St. Rep. 693, 29 Pac. 340; *Rhodes v. Williams*, 12 N. W. 26.

the power of vacating an order appointing a receiver made before the trial.¹⁹

§ 420. Benefit of granting motion belongs exclusively to those joining in motion.

The question of proper and necessary parties to the proceeding for a new trial has been already fully discussed in its proper place.²⁰ It is only necessary here to state that the benefits of a successful prosecution of the motion belong exclusively to the parties prosecuting it; nor can any one of several parties against whom a judgment is rendered, who does not join in a motion for a new trial, complain of alleged error denying a new trial.²¹ In *Kent v. San Francisco Savings Union*,²² it was held that the fact that a new trial was granted upon motion of a subsequent lienholder only in a foreclosure suit, and that the purchaser did not move for a new trial, or appeal from the judgment, and that it was final as to him, could not deprive the court of power to correct the error made in the former decree, even though such correction might incidentally affect the purchaser. In the course of the opinion, the court said: "It would be a strange doctrine if a court, in an action against several defendants, made a decree doing injustice to one of them, and, on application of the one alone, granted a new trial, should then be powerless to grant any relief at all as to the one, or to modify its decree so as to make it what it should have been in the first place." On like principle, where a suit for damages was brought jointly against a city and an individual, and an order was made dismissing the action as to the city, "because the declaration showed no cause of action against that defendant," and a verdict was rendered in favor of the other defendant, the granting of a new trial at the instance of plaintiff was held not to reopen the case against the city.²³

¹⁹ *Copper Hill Min. Co. v. Spencer* (No. 1), 25 Cal. 11.

²⁰ Ante, §§ 358, 359.

²¹ *Calderwood v. Brooks*, 28 Cal. 151.

²² 130 Cal. 400, 408, 62 Pac. 620.

²³ *Atlanta (City of) v. Anderson*, 90 Ga. 481, 16 S. E. 209.

§ 421. Effect of order granting upon status of parties at retrial.

The granting, generally, of a new trial reopens the case back to the pleadings; and at a retrial, the parties to the proceeding for new trial hold the same relative positions with respect to the burden of proof, etc., as if the cause had never been tried. Accordingly, when a verdict in plaintiff's favor was set aside, and a new trial ordered, and on the calling of the case for retrial, the plaintiff, having the burden of proof, declined to proceed, it was held that judgment should have been rendered in favor of the defendant, for want of prosecution.²⁴ For the same reason—namely, that there must be a trial *de novo*—an admission made to restrict the issues on a trial then in progress will not bind the party on a new trial wherein new issues are presented to the jury.²⁵ Nor can a plaintiff, after judgment is rendered against him, and after a new trial is granted on his motion, avoid the conclusiveness of the judgment against him by then dismissing the action. The judgment continues in fact as if no new trial had been granted.²⁶

While, as has been seen, the court may, in ruling on the motion, restrict the issues to be retried,²⁷ yet, if that course be not taken, a general unqualified grant of a new trial reopens the case as to all the issues involved as between the parties to the proceeding for a new trial. Thus, where a plaintiff sued for two distinct parcels of realty in the same action, and there was a verdict in his favor as to one, and in favor of the defendant as to the other, it was held that a general grant of a new

²⁴ *Monteith v. Union Pac. D. & C. R. Co.*, 13 Colo. App. 421, 58 Pac. 330. Under a statute (Compiled Laws of South Dakota, section 5034) providing that "there need be but one notice of trial, and one note of issue from either party, and the action must then remain on the calendar until disposed of," the granting of a new trial does not render it necessary to serve a second notice of trial; the effect being to restore the cause to the calendar as it stood before the first trial: *Connor v. Corson*, 13 S. Dak. 550, 84 N. W. 191, 83 N. W. 588.

²⁵ *Murphy v. Gillum*, 79 Mo. App. 564.

²⁶ *Ferris v. Udell*, 139 Ind. 579, 38 N. E. 180.

²⁷ See ante, §§ 374, 394-396.

trial at the instance of either party reopened the entire case for investigation.²⁸

§ 422. No waiver by proceeding as a general rule.

As a general rule, especially in jurisdictions where the proceeding is considered independent, proceeding on its own initiatory process and record, a party waives no right by beginning and prosecuting it.

Where a judgment had been entered against a party without making or filing findings of fact, it was held that he did not waive his right to object that there were none by moving for a new trial.²⁹ So, since where the trial is by the court without a jury, plaintiff is entitled to take a nonsuit at any time before the finding of the court is recorded, a motion for new trial on the ground that the court erred in refusing a nonsuit does not waive plaintiff's right thereto.³⁰ The same rule as to the preservation of all rights without an imputation of waiver or loss in view of the motion for new trial is applied in criminal as in civil cases. And it was held that a motion for a new trial, made by the counsel for the defendant when called for

²⁸ Bourquin v. Bourquin, 110 Ga. 440, 35 S. E. 710.

²⁹ Savings etc. Society v. Thorne, 67 Cal. 53, 7 Pac. 36. In this case the court said: "In this case a jury was waived, and trial had by the court. Findings were not filed or waived, and a judgment was entered in favor of the defendant. After the lapse of more than six months, plaintiff moved to have the judgment vacated on the ground above indicated. The motion was granted and from the order granting it this appeal was taken. . . . Before giving notice of his motion to have the judgment vacated the plaintiff gave notice that he would move for a new trial, and afterward gave notice of his abandonment of that motion. Appellants insist that by giving notice of motion for a new trial plaintiff waived findings. The statute, however, enumerates the modes by which findings may be waived and that is not one of them. The modes enumerated must be held to be exclusive. This case is not within the purview of section 473 of the Code of Civil Procedure."

³⁰ Denton v. Central School Supply House, 61 Ill. App. 267. A motion for judgment on special findings, notwithstanding the general verdict, and one for a new trial, may be filed at the same time; and the submission and decision of the former motion will not operate as a waiver of the latter: Atchison etc. R. Co. v. Holland, 58 Kan. 317, 49 Pac. 71.

sentence, did not constitute a waiver by the defendant of the arraignment required by the statute, where he was sentenced upon denying the motion for new trial.³¹

³¹ People v. Walker, 132 Cal. 137, 64 Pac. 133.

